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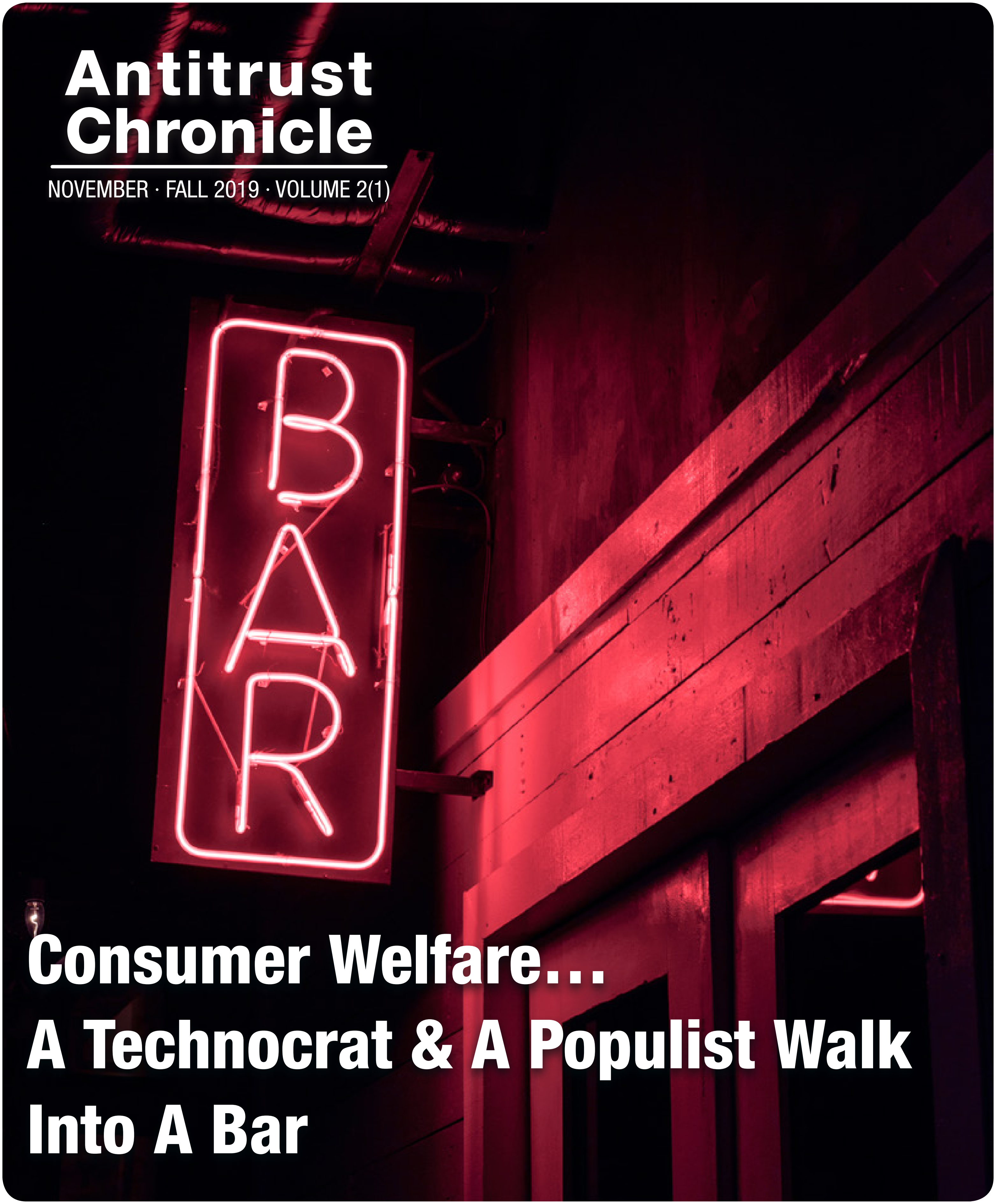

Consumer Welfare... A Technocrat & A Populist Walk Into A Bar

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this issue of the CPI Antitrust Chronicle, we tackle the ongoing debate surrounding the consumer welfare standard in antitrust law.

Since the rise to pre-eminence in the 1970s of the U.S. Chicago School, and the "more economic approach" to competition law enforcement in the EU in the 1990s, the consensus was, for a long time, that the overarching goal of antitrust rules should be to protect "consumer welfare."

While its contours are hotly debated, even by its proponents, the notion of consumer welfare permeates all aspects of antitrust enforcement, ranging from anticompetitive agreements, to alleged monopolization, to merger control. More recently, however, critics of current antitrust enforcement (and in the view of some – under-enforcement) have called this consensus into question.

This has been spurred on largely by technological developments, which render the quantification of consumer welfare difficult in high tech markets, and call into question the analytical framework that competition enforcers have used over the past decades.

As in other hotly contested-debates, participants on one side or the other are known by colorful labels: "Hipsters," "Neo-Brandeisians" or "populists," on the one hand, are pitted against "technocrats," or "Borkians," on the other. This issue compiles a range of articles from across this spectrum. While this debate will no doubt rage on for some time to come, each of these articles offers a valuable contribution to the key question: "what is the purpose of antitrust enforcement?"

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

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CPI Talks…

…with Eleanor M. Fox

In this month's edition of CPI Talks we have the pleasure of speaking with Professor Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at the New York University School of Law.

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Why does the Consumer Welfare Standard Work? Matching Methods to Markets

By James Bernard, Rebecca Kirk Fair & D. Daniel Sokol

The appropriate goals of antitrust have again became the subject of debate, with some critics questioning whether an economics-based goal (the consumer welfare standard) is still relevant. In our view, economic reasoning provided the foundation for the courts' adoption of the consumer welfare standard as the framework through which to evaluate antitrust enforcement, and it has also provided the tools used to apply the standard to specific markets. In this paper, we maintain that consumer welfare, as understood today, is flexible to changes in economic thinking and continues to work as the method of analysis for antitrust law. Using examples from several prominent merger reviews, we illustrate how economic analysis has shifted over time in ways that both promote enforcement and limit enforcement. These examples illustrate the importance of mapping theory to practical realities when analyzing competitive effects in different markets.

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Technocrats, Populists, Hipsters, and Romantics – Who Else is Lurking in the Corners of the Bar

By Anne C. Witt

The advent of powerful Tech giants, growing industrial concentration, and increasing levels of wealth disparity have sparked a wide-ranging debate on the aims of competition law. Politicians, the media and academics alike are currently questioning whether the relatively narrow consumer welfare aim, which has been guiding the interpretation of most Western competition regimes for the past few decades, is really achieving desirable results, or whether it is time to call it day, and to return to a broader reading of the law. Few topics seem capable of inflaming competition lawyers' passions quite like the irksome issue of the law's true purpose. Unsurprisingly, the debate is not only heated, but ideologically charged and highly polarised. This contribution argues that labels such as antitrust hipsterism, technocracy or populism are not conducive to a meaningful exchange, and that a rational, non-judgmental and evidence-based discussion of the issues would be a more helpful approach to dealing with the current controversy.

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The Consumer Welfare Controversy

By Barak Orbach

"Consumer welfare" ("CW") is the stated goal of antitrust law. Among the cognoscenti, the CW standard is a proxy for the transformation of antitrust law over the past four decades and Robert Bork's deep imprint on antitrust law. In recent years, calls to abandon the CW standard and replace it with an array of fairness values gained traction. This paper summarizes the key findings and conclusions of my study of the CW controversy. The CW standard, I argue, has failed to protect competition effectively because it has multiple meanings and its applications are guided by erroneous premises. These problems should be addressed. The goal of antitrust law, I argue, should align with antitrust's core task: protecting the competitive process by banning business agreements, practices, and transactions whose adverse effects on trading opportunities unreasonably impair the process.

SUMMARIES

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Strengthening Antitrust Enforcement within The Consumer Welfare Rubric

By Marina Lao

Among the many who agree that the antitrust laws are underenforced, some see the consumer welfare standard as fundamentally flawed and say it should be abandoned. While I share their concerns about the enormous power of the largest digital platforms, I argue that the consumer welfare standard is capable of a broader reach than is often assumed. It can reach effects on non-consumers, including even competitors; and it can also take into account nonprice effects. Antitrust enforcement has fallen short, not because of legal deficiencies in the standard but because of practical problems of implementation and other factors. Finding solutions to those problems within the consumer welfare rubric would be less disruptive and more effective than abandoning a paradigm that is conceptually sound. Consumer welfare, it is true, does not address social and political harms unrelated to competition, but there are better instruments for directly addressing those harms. Abandoning the economically grounded paradigm risks throwing out the good along with the bad.

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Powerless Antitrust

By Michelle Meagher

Antitrust has been doubly disempowered: we can no longer effectively regulate corporate power and many forms of corporate power are now irrelevant to antitrust analysis. Drawing on the interconnected histories of antitrust and corporate law, this article makes the case for empowering corporate regulators by taking a broader view of corporate power and by challenging not just anticompetitive harm but corporate power itself. The social and environmental vulnerabilities and concerns that are of paramount importance now but which currently fall between the interstices of the regulatory regime should instead be caught by antitrust. This new framework for antitrust builds on the historical models by creating dual and mutually reinforcing roles for the competition regulators and a new corporations regulator.

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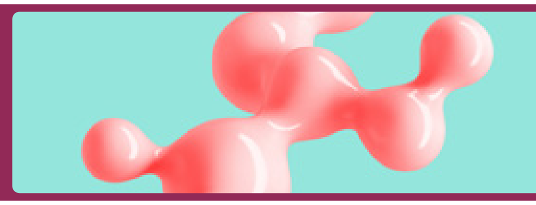

Antitrust Amorphisms

By Sean P. Sullivan

Advocates of traditional antitrust are increasingly called upon to the defend the existing framework. In doing so they face a challenge: the traditional framework is actually quite difficult to explain. The problem is not that modern antitrust involves a lot of advanced economics — though that is also true. The problem is that foundational antitrust concepts like "harm to competition" and the protection of "consumer welfare" are shockingly ill-defined. This essay highlights several of the dormant ambiguities in these concepts, and thus the obstacles that antitrust has set for itself by failing to fully define its terms.

WHAT'S NEXT?

For December 2019, we will feature Chronicles focused on issues related to (1) **Inequality**; and (2) **Global Digital Reports**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE JANUARY 2020

For January 2020, we will feature Chronicles focused on issues related to (1) **Agriculture**; and (2) **Labor Markets**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with Eleanor M. Fox

In this month's edition of CPI Talks we have the pleasure of speaking with Professor Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at the New York University School of Law.

Thank you, Professor Fox, for sharing your time for this interview with CPI.

1. **"Consumer welfare" is a loaded term. Even for its advocates, it can refer to myriad concepts: overall economic surplus, consumer surplus specifically, and can even encompass "dynamic" considerations like incentivizing innovation. Given this ambiguity, is the debate over whether "consumer welfare" should be the "grand unifying theory" of antitrust a rhetorical red herring? Are we obscuring the real debate, which is *how* competition rules should achieve better outcomes, rather than what those outcomes should be?**

Yes, when people say "Antitrust is for consumer welfare," they are obscuring the real debate. I am constantly bemused by the ardent defense of "The Consumer Welfare Standard." There is no such thing as "THE" Consumer Welfare Standard. It is not a unified theory. It is a range of standards, and they all devolve from a principal goal of protecting and facilitating the competition process.

I am in favor of truth in vocabulary. The March Hare and the Mad Hatter were right when they chastised Alice for her verbal imprecision (as she contemplated the riddle of why a raven is like a writing desk).

> "Then you should say what you mean," the March Hare went on.
>
> "I do," Alice hastily replied; "at least—at least I mean what I say— that's the same thing, you know."
>
> "Not the same thing a bit," said the Hatter.[1]

The advocates of the consumer welfare epithet do not say what they mean.

Antitrust is vibrant and dynamic. Its goal is to create or maintain robust markets. The words "consumer welfare" are static, passive and reductive, and they represent only one side of the market. They give no clue that the law is concerned with innovation and incentives, that it protects sellers harmed by buyer cartels, or that it may protect workers harmed by restraints in labor markets and sellers harmed by mergers that increase buyer power. The word "consumer" needs a lot of stretching to connote the dynamic process of competition, which benefits all market players except those who seek protection or privilege.

The fact that "consumer welfare" is an incomplete phrase should not obscure the critical importance of consumer welfare and consumers' interests in antitrust analysis. Consumer welfare does a lot of work, and coming to grips with the limits of the language does not and should not change this. Impact of conduct or transactions on people in their capacity of consumers is the first line of analysis, and often but not always the last line of analysis; and if a proposed enforcement should harm consumers, that should usually disqualify the enforcement.

1 Lewis Carroll, Alice in Wonderland (1865), excerpt from chapter VII, "A Mad Tea-party."

2. On the other hand, does the current discussion not, however clumsily, at least present an opportunity to sharpen thinking on the scope of "competition" rules? The "Hipsters" openly contend that antitrust enforcement should not be guided solely by economic efficiency, but should also take into account other goals, be they industrial policy, privacy, the environment, and even the protection of democracy itself. Might it be more honest to debate whether antitrust enforcement should also protect these interests, and to do so in straightforward language, rather than shoehorning more and more disparate goals under the rubric of "consumer welfare"?

Since we are talking semantics, do you mind if I take this opportunity to say: I do not use the term "hipster" in the antitrust policy context. It is a pejorative term to put down people who believe that the market system is not working for the people and that antitrust can do a better job in constraining power. I just searched for a definition of the word "hipster." Here is the first entry that came up: "Members of the subculture typically do not self-identify as hipsters, and the word hipster is often used as a pejorative for someone who is pretentious or overly trendy …."[2]

To answer your question, yes, precisely. We want vocabulary that helps us sharpen thinking on the scope of competition rules. "Consumer welfare" does not do the job because it is either too narrow or it does not mean what it says. It never was the limiting principle of antitrust.

I have practiced antitrust law since 1962. I can testify that the term "consumer welfare" was not used in US antitrust conversation or jurisprudence before the Reagan Revolution of 1981.[3] The Reagan Revolution came on the heels of changes in the membership of the US Supreme Court in the late 1970s resulting in a business-friendly Court. By the late 1970s, regulation in general had become overbroad and was handicapping US business as it confronted new global competition. Reagan ran on a ticket of getting government off the back of business. The question was: How do you cut back antitrust law as far as it could go? The answer was: Mandating that there should be no antitrust enforcement unless firms' conduct or transactions impaired allocative efficiency – a position that had been urged for two decades by the Chicago School. The first merger guidelines under Reagan shifted the focus of antitrust merger analysis from keeping rivalry dynamic and stemming the tide of increasing business concentration, to staying out of the way unless allocative efficiency was impaired. The 1982 merger guidelines not only backed away from the dynamic rivalry concept, but were more concerned with the triangle than the rectangle, which is, as economists say, "only a wealth transfer." It was apparently hard to sell the allocative efficiency abstraction to the people. There was no logical constituency, although the metric still has its ardent supporters. Gradually, consumers became the constituency. This, incidentally, was very helpful in regaining popular support for the antitrust laws; although a popular perception in the United States today that the law is not delivering for consumers and the people is weakening that support.

Do we need "consumer welfare" lingo to sharpen thinking on what antitrust covers? Not at all. To sharpen thinking we need to take two tacks. One, unbundling the big tent[4] of consumer welfare, and two, considering (if the jurisdiction wants to) whether non-market factors such as jobs, small business, and national champions should be relevant factors.

When we unbundle the consumer welfare rubric, we observe that those who identify as proponents range from those who are very skeptical about antitrust enforcement and would withhold it except where conduct increases the triangle of dead weight loss and has no good business purpose (the Federalist Society), to those concerned that significant market power blights the economy and would use antitrust aggressively to contain it. (American Antitrust Institute). Incidentally, probably none of the experts advocates use of antitrust to *maximize* consumer well-being, although a critical mass of people claim that that is the goal of antitrust.

What do these diverse groups under the big tent have in common? This leads to the second tack. They oppose non-market factors in antitrust. Not jobs, not environment, not national champions. As for democracy and freedom, that is another story, for many of the occupants of the big consumer welfare tent claim that their vision of the appropriate degree of market intervention or non-intervention is the one that promotes democracy and freedom.

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2 Wikipedia.

3 One famous case invoked consumer welfare even before Reagan's presidency. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court declared that antitrust was meant to serve consumers, and cited Robert Bork's famous conclusion that antitrust was for consumer welfare (although equally famously, Bork used the phrase to mean total welfare). Stunningly, *Reiter* was a case in which price-fixers of hearing aids asked the court to dismiss the case against them on grounds that the plaintiffs were only consumers; therefore, they could not have been "injured in their business or property" as required by Section 4 of the Clayton Act. I remember when this point of statutory interpretation was urged, accepted by the appellate court, supported by much of the bar, and finally rejected by the Supreme Court. *Reiter* proved only that consumers were not excluded from antitrust enforcement.

4 See Daniel Crane, A Premature Postmortem for the Chicago School of Antitrust, Business History Review, in publication (describing the big tent of consumer welfare, in which everyone from the laissez faire right to the break-them-up left claims a spot).

3. **Antitrust is political. For example, in the EU, Commissioner Vestager has recently been re-nominated as the Commissioner for Competition, with, unprecedently, a combined role in charge of the EU's "digital policy." On the one hand, this could be seen as an implicit rejection by a leading enforcement body of the notion that competition rules exclusively protect "consumer welfare" (in a narrow sense). On the other hand, could such developments risk muddying the waters even further, by enticing enforcers to brand more and more conduct as contrary to "consumer welfare" (in an ever-broadening sense)? The term is already loaded. Is it at risk of collapsing under its own weight?**

First, neither the Competition Directorate-General of the European Union nor the EU Courts declare consumer welfare to be the sole goal of competition law. Although their word usage varies from time to time and from judgment to judgment, they often say that the law is for all market players, consumers and efficient or potentially efficient entrepreneurs (but not for anyone who wants special privilege or protection). They often identify the goal as protecting the market process; the process, undistorted by uses and abuses of power, will protect consumers.

The objective of a single digital market fits nicely, not antagonistically, with the paradigm of competition as a healthy, dynamic process. There may be questions as to how consumer protection and data protection fit with the competition mandate, but raising these questions does not muddy waters. To the extent that we can usefully integrate competition, consumer protection and data protection, that will be progress in shoring up the legitimacy of the market system.

4. **From a purely practical perspective, competition rules need to be administrable, enforceable, and predictable. But antitrust laws (notably Section 2 of the Sherman Act and Article 102 TFEU) are notoriously vague. To many stakeholders (particularly companies likely to be on the receiving end of enforcement, and their lawyers), the "consumer welfare standard" is a placeholder for a limiting principle on the specific rules that enforcers and courts can permissibly derive from such open-ended legal provisions. In this sense is (some version of) the "consumer welfare standard" at least useful as a heuristic? Or should we be looking for other methods to define the outer limits of antitrust rules and their enforcement?**

I like administrability and predictability. But your question assumes that there is a consumer welfare standard and that it is meaningful and predictable; that it is the best descriptor of what courts do and what various players in the antitrust community mean when they say: This is the standard for antitrust. Whether you call this enterprise "consumer welfare" or "protecting competition" or "protecting the market process," you still have the same question: How to define the inner core and the outer limits. In fact, the consumer welfare rubric muddies the waters because of its imprecision and the fact that it lends itself to wrong inferences. It implies that protecting sellers from a buyers' cartel is industrial policy and that protecting consumers from platforms' deceptions is competition policy. It obfuscates the real existential debate in competition law today, which is the debate for the soul of antitrust within the big tent.

I think you are really asking, Is the neo-Brandeisian perspective (which rejects "consumer welfare" as a silo) ill-advised because it brings non-market discourse into the analysis and therefore challenges both the limits and the predictability of antitrust rules? This is a very different question from whether "consumer welfare" is the best descriptor of the market discourse.

We do have to confront the question of the relevance of non-market factors. We can confront it more cleanly if we don't insist: "stick with consumer welfare, or lose the legitimacy of antitrust."

In the aftermath of the prohibition of the *Siemens/Alstom* merger, Europe is debating industrial policy in antitrust. In the wake of climate change, Europe is debating sustainability in antitrust. South Africa, still recovering the ravages of apartheid, is in the process of implementing amendments to its Competition Act that mandate greater inclusiveness. To the extent that the competition laws of various nations incorporate non-market goals, the systems will have to work hard to make the laws administrable and predictable. South Africa has just published proposed regulations in an effort to do just that.

5. **Finally, since this interview is about words, what is your final word on consumer welfare?**

I stand with the Mad Hatter. The best we can do with words is to say what we mean. Competition law protects competition.

WHY DOES THE CONSUMER WELFARE STANDARD WORK? MATCHING METHODS TO MARKETS

BY JAMES BERNARD, REBECCA KIRK FAIR & D. DANIEL SOKOL[1]

  

1 James Bernard is an Associate and Rebecca Kirk Fair is a Managing Principal at Analysis Group, Inc.; D. Daniel Sokol is a University of Florida Research Foundation Professor of Law at the University of Florida, Levin College of Law and Senior Advisor, White & Case LLP.

I. ECONOMIC PRESUMPTIONS DRIVE LEGAL PRESUMPTIONS

Much of the competition policy discussion today centers around goals of antitrust. As recently as 2013, a symposium on the goals of antitrust that appeared in the Fordham Law Review suggested that antitrust goals were economic ones.[2] Anyone who thought otherwise was on the fringe and discounted both academically and within policy circles.

Yet only a few years later, the goals of antitrust once again became the subject of debate due to a concatenation of events. Growing populism on both the left and right in the United States and globally; a number of studies showing increased income inequality and increased concentration; digital transformations across industries that disrupt traditional ways of the organization of economic activity and life more generally; and the lingering effects of the Great Recession all have caused people in policy settings, some antitrust authorities, and some scholars to question whether or not an economics-based goal (which for shorthand we call the consumer welfare standard) is relevant.

We suggest that consumer welfare works as the method of analysis for antitrust law. Unlike critiques that treat consumer welfare as a caricature within a simplistic early-1970s framework of "Chicago School" economics, we suggest that consumer welfare as understood today is flexible to changes in economic thinking. Nor are we alone in such an understanding. As the U.S. Supreme Court stated in 2015, "We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences."[3]

Antitrust analysis in the United States is shaped by judges rather than by a complex statutory scheme. The primary enabling statute, the Sherman Act, is relatively short and vague. Thus, to understand the use of economic analysis and why it works in an antitrust context, we must first begin with an understanding of the nature of antitrust law and how antitrust law works.

Antitrust law's general application created a common-law-like development for antitrust case law. Yet, antitrust common law development is dissimilar to many other fields of law in that *stare decisis* plays a much smaller role in antitrust.[4] Thus, by design, antitrust law doctrines can shift as the understanding of certain economic theories become more established and developed.

Changes in economics lead to different legal presumptions. For example, when the economic understanding of an issue is unclear, *per se* legal rules may make more sense because the "*per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work."[5] When shifts occur in economic understanding, this may lead to a reevaluation of the legal presumption to incorporate the ways that certain behavior may require a more nuanced treatment under the rule of reason.[6]

Such Type II errors were corrected in particular for certain types of vertical restraints such as minimum resale prince maintenance, maximum resale price maintenance, and territorial restrictions because of a better understanding of the economics underlying these practices. In other settings, changes in how economic insights view competitive harm may suggest the need for legal presumptions that are more receptive to theories of harm, such as most-favored-nation clauses ("MFNs") or health care mergers, where there may have been a number of Type I errors. The critical point is that to ensure against both types of errors, the economic analysis needs to be done correctly.

If there is a non-economics standard, some sort of fairness consideration takes the place of economics. What is "fair" is often indeterminate. For those of us who are parents of more than one child and/or who have siblings of our own, what is fair is best understood as those situations that benefit me, whereas what is unfair would be those situations that benefit someone else.

Because economic analysis allows for more precision than fairness, we believe that it is important to highlight examples that show how economic analysis has shifted over time in ways that both promote enforcement and limit enforcement. All too often, the populist narratives of antitrust overlook such changes in economic thinking, where new theories and approaches can be applied to new settings.

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2 Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 Fordham L. Rev. 8151 (2013) (providing an overview of the symposium).

3 *Kimble v. Marvel,* 135 S. Ct. 2401, 2412 - 13 (2015). This approach far predates a "Chicago" turn in the courts. See e.g. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933).

4 D. Daniel Sokol, "Rethinking the Efficiency of the Common Law," *Notre Dame L. Rev.* (forthcoming). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328025.

5 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

6 William Breit, "Resale Price Maintenance: What Do Economists Know and When Did They Know It?," *Journal of Institutional and Theoretical Economics,* Vol. 147, pp. 72-90 (1991).

II. "BRING THE BEST EVIDENCE": MAPPING THEORY TO PRACTICAL REALITIES IN MERGER REVIEWS

Examining the critical role for economic evidence in merger reviews provides some illustrative insights highlighting the importance of mapping theory to practical realities. Economic reasoning provided the foundation for the courts' adoption of the consumer welfare standard as the framework through which to evaluate antitrust enforcement, and it has also provided the tools used to apply the standard to specific markets.

In merger reviews, economics provides a diverse set of tools and methodologies that can be used to examine the extent to which a proposed merger is expected to harm consumers and for assessing such harm in the context of dynamic competition. Economists can use market data, survey data, business documents, and natural experiments to assess market concentration and current and future diversion rates, and to forecast price and quantity outcomes to evaluate the competitive effects of any proposed merger.

Yet, when courts use the wrong analytical tools, rely upon incomplete or inaccurate inputs or assumptions, or incorrectly apply the correct tools, their conclusions will be flawed. In such cases, the courts will not be able to offer accurate predictions about the harm or benefit that could come from a proposed merger.

In this section, we discuss several examples in which application of the appropriate economic methodology made the competitive impact of a merger clear, while misapplication of economic thinking can lead to a different, incorrect conclusion.

An examination of the evolution of merger review in different markets over the last 20 years offers examples that illustrate the importance of using the right evidence and the right methodologies for each circumstance. Just because an analytical tool works for evaluating a specific merger in a specific industry, that does not mean the same tool will provide evidence that is helpful for evaluating another merger in a different industry.

In fact, even within a given industry, market dynamics can render previously insightful economic analyses obsolete. For instance, antitrust analysis based on spatial competition among brick-and-mortar retailers may not capture the intensity of ongoing price competition post-merger as well as it did prior to the arrival of internet suppliers who can ship goods to customers regardless of store locations.

As economists develop improved methodologies and as industries evolve, so too must antitrust authorities adapt their methodologies. And to their credit, they have. For instance, after the 1990s, the courts changed their approach to hospital merger analysis after post-merger reviews demonstrated that these mergers were consistently increasing health care costs.[7] Antitrust authorities, moreover, have proved open to considering new methodologies that can improve their ability to predict the impacts of mergers. For example, in some instances, courts have accepted appropriately designed consumer surveys to lend insights in contexts where the publicly available data are inadequate.[8]

With so many kinds of evidence at hand, the right economic analysis to evaluate a given merger must be tailored to the specific competitive context. It must take into account the major drivers of price in a given market, and it must be able to predict the competitive impact of consolidation in that market.

A. Matching Methods to Market Context: Lessons from a History of Hospital Mergers

The consumer welfare standard works as long as the right consumers are identified. As the Federal Trade Commission ("FTC") recognized after a string of unsuccessful attempts to block hospital mergers in the 1990s, the methodology used to evaluate expected outcomes must be appropriately matched to the market if it is to be effective.

In earlier merger reviews, the merging parties adopted from manufacturing industries an Elzinga-Hogarty ("E-H") analysis of inflows and outflows to identify broad "relevant" geographic markets.[9] If there were substantial inflows and outflows of goods across geographies, so the E-H logic went, then it would be easy for customers to switch to different sellers if the merging suppliers attempted to raise prices.

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7 David Dranove & Andrew Sfekas, "The Revolution in Health Care Antitrust: New Methods and Provocative Implications," *The Milbank Quarterly,* Vol. 87, pp. 607-632 (2009).

8 Federal Communications Commission and Department of Justice approval for AT&T acquisition of DirectTV (2015); French Competition Authority approval of Fnac acquisition of Darty (2016); and Federal Trade Commission approval of WEX acquisition of EFS (2016).

9 Kenneth G. Elzinga & Thomas F. Hogarty, "The Problem of Geographic Market Delineation in Antimerger Suits," *Antitrust Bulletin*, Vol. 18, pp. 45-81 (1973); Kenneth G. Elzinga & Thomas F. Hogarty, "The Problem of Geographic Market Delineation Revisited: The Case of Coal," *Antitrust Bulletin*, Vol. 23, Pp. 1-18 (1978).

However, the E-H approach had been developed to describe the flow of manufactured goods into and out of a region, not the flow of people seeking health care services. By assuming that the distribution of patients could be modeled based on theories and methodologies established for manufactured goods in evaluating market concentration, the economics applied in these matters missed a crucial economic point – namely, that just because some individual patients were willing to travel long distances for specific hospital services, it did not imply that other patients would be willing to travel further if prices at the merging hospitals increased.

Treatment choices are determined based on a series of factors, and price is likely to be of marginal, if any, significance to patients, given the presence of insurance coverage and co-pays. Individual patients choosing medical care will rely on very individualized criteria, influenced largely by the type of service being sought. Some patients will seek convenience, preferring to go to a hospital that is close to home. Others will make decisions based on the availability of specialized services or coverage within a particular plan's network, the state of a hospital's facilities, reputation, or a range of other factors.

Given that many patients are protected from the full marginal cost of health care service, price is likely to play a minimal part in their decision making. In fact, data from post-merger markets showed that mergers approved under the E-H approach ultimately led to higher prices.

In actuality, the most price-sensitive "consumer" following a proposed merger of health care service providers (such as hospital systems or physician groups) is more likely to be the payers for those services, which are the insurers. In the health care industry, the price for the same service, procedure, or product can differ substantially across markets, across providers, and even for the same provider in relation to different health insurers. Consequently, concentration in both the insurer market and the provider market may be relevant when modeling the effects of a merger of two hospitals.

Eventually, a different model was proposed in hospital mergers that accounted for this two-stage model of competition, where hospitals first negotiate with insurers, and only subsequently compete for patients.[10] When the FTC started examining hospitals' ability to exercise market power over insurers, instead of focusing only on the end "consumer" (the patients), the FTC found that it was able to model competitive effects more accurately and construct arguments that reflected market structure and dynamics more effectively.

B. Natural Experiments: Staples/Office Depot I

In other instances, long-standing rules of thumb are being reevaluated for their appropriate – or not – application in a given circumstance. In 1997, the U.S. District Court for the District of Columbia rejected a proposed merger between Staples and Office Depot, two office supply "superstores," when the results from a natural experiment justified a narrower market definition.[11] At the time, Staples and Office Depot together controlled a mere 5.5 percent of the office products market based on sales data from any type of retail outlet.

In a traditional assessment of market concentration, that level would be below the threshold under the Horizontal Merger Guidelines that would justify a request to block the merger. However, upon closer examination, the FTC identified data and outcomes that suggested that a narrower market definition was warranted. Specifically, the FTC evaluated real-world market data related to pricing in sub-segments of retail outlets. When available, assessments of natural experiments such as this one can be useful in predicting outcomes post-merger.

At the time, only three superstores were in the market: Staples, Office Depot, and OfficeMax. Given geographic variation in the presence of these competitors, the FTC compared Staples' prices in geographic markets where Staples was the only office supply superstore to its prices in geographic markets where Staples competed with one or both of the other two superstores. It found that when Staples was the only office supply superstore in an area, its prices were an average of 13 percent higher than when all three chains were present. Similarly, Staples' prices were higher in regions where it only competed with OfficeMax than where it competed with both OfficeMax and Office Depot.

This evidence supported a narrower market definition that included only office supplies sold through office supply superstores, not through any other retail outlet. Based on this analysis, the FTC successfully argued that, by reducing the number of competitors from three to two, a Staples/Office Depot merger would allow the combined firm to increase prices above their current levels. Thus, whereas a judge who only considered Staples' and Office Depot's small share of overall office supply sales might have allowed the merger, the data from the natural experiment provided the necessary evidence for the judge to block a merger that posed a risk of harm to consumers.

10 Recent discourse surrounding the evaluation of hospital mergers, accordingly, ignores patient flows, and instead focuses on how mergers affect bargaining leverage between hospitals and insurers. See, e.g. Dov Rothman & David Toniatti, "Comment on the Flaws in Using the Hypothetical Monopolist Test from the 'Payor Perspective,'" in Health Care Merger Cases, by Field, Fisher & Coglianese, *The Antitrust Source*, December 2017.

11 *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

C. Competitive Realities, Efficiencies, and Consumer Benefits: Baby Foods

A few years later, the FTC faced another proposed merger that they argued was a 3-to-2 merger that would lead to anticompetitive effects, this time in the market for baby foods. Eight years after that, however, the FTC's own examination of the resulting competitive landscape cast doubt on the economic analysis underlying the decision.

In 2000, the second-largest baby food manufacturer in the United States, H.J. Heinz, agreed to acquire Milnot Holding Corp., the parent of the third-largest baby food manufacturer, Beech-Nut. At the time, the U.S. market was dominated by Gerber, which claimed a 71-72 percent share. Heinz and Beech-Nut each claimed about 13 percent.

In its evaluation of the proposed merger, the FTC focused its arguments around the number of post-merger competitors, citing the circumstance that the proposed merger would reduce the number of meaningful competitors from three to two. Heinz and Beech-Nut countered by arguing that Gerber, in fact, was the dominant player, and neither of the other two firms by itself provided meaningful competitive constraints to Gerber. The parties presented evidence that the only way to introduce a viable competitor to Gerber would be to take advantage of the cost savings and economies of scale of a merged firm. Thus, instead of representing a 3-to-2 merger, the transaction actually would move the industry from a near-monopoly to something closer to a duopoly.

The DC Circuit reversed a finding that allowed the merger based on an efficiencies rationale, thereby rejecting the proponents' position and blocking the merger. However, within a few years the FTC's own analysis showed that, while continuing to operate independently, Heinz's market share sank to a negligible 2 percent and Beech-Nut's declined to 11 or 12 percent.[12] At the same time, Gerber increased its already dominant share, despite raising its prices. In fact, by 2008 Gerber had nearly doubled the price difference it enjoyed over Beech-Nut, increasing from a difference of 32 cents for 16 ounces of baby food in 2000 to a difference of 61 cents by 2008. Despite this increase, Gerber was able to further expand its leading position in the marketplace.

The FTC's decision to block the Heinz/Beech-Nut merger did not help to maintain the market structure the FTC sought to protect, and the number of national mainstream baby food competitors fell from three to two as a result. Moreover, the decision prevented Heinz and Beech-Nut from potentially achieving sufficient economies of scale to develop into a substantial competitor to Gerber.[13] This result emphasizes the need to consider not just the number of competitors, but the nature of the competitive position of each and how a merger may actually increase competition even if the number of players is reduced.

D. Measuring Switching Behavior: Alternative Data Sources

Each of these prior cases emphasizes the critical need to understand the specific dynamics in a marketplace – how consumers make decisions, and how competition manifests itself – in order to accurately assess the expected competitive effects of any merger. For example, the experience with hospital mergers highlights the need for accurately identifying the underlying drivers of purchase decisions, particularly those that go beyond price to factors such as quality, relative performance, convenience, and availability. This can allow for better insights into market definition and future effects.

The history of the *Staples/Office Depot I* merger review shows how aggregated, widely tracked market shares for a product or service category may not accurately reflect the extent to which consumers consider products or distribution channels to be substitutes. Often, in retail industries, traditionally reported market shares are based on publicly available information such as scanner data, shipping manifests, or geographic proximity of brick-and-mortar stores. These type of data may not be fully representative of price competition in complex markets, especially those undergoing rapid change based on advances in technology and digital transformations. For example, fully understanding the competitive dynamics in digital and hybrid markets requires accounting for the interrelationships between online and offline distribution channels and retail outlets.

In 2016, the landmark merger decision by the French Competition Authority ("FCA") to approve the Fnac/Darty merger highlighted a growing recognition that both spatial and price competition are important to evaluating the potential competitive effects of a merger. Specifically, the FCA requested that the parties account for online sales in their assessment of local/regional market shares for electronic products across France. The FCA economists also evaluated third-party data to allocate both online and offline sales across regions to compute market shares and better understand the impact of the merger on local competitive conditions.

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12 *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 720–22 (D.C. Cir. 2001).

13 Viola Chen, "The Evolution of the Baby Food Industry, 2000 - 2008," *Journal of Competition Law & Economics,* Vol 6:2, pp. 423-442 (2009).

Consequently, despite what may have initially appeared to be an unacceptable consolidation of brick-and-mortar retailers, the agency recognized that consumer behavior had shifted and that online sales exerted significant competitive pressure, such that the market shares for physical stores were less relevant to the assessment of market dominance.

Fnac/Darty also shows how the use of alternative data sources can be incorporated by agencies and parties alike to illustrate shifting consumer preferences or to better model expected post-merger outcomes. In its review, the FCA first commissioned a survey of consumers to study their shopping habits. It then used the survey results, along with other evidence, to devise a weighted scoring method for calculating market shares and concentration measures, taking into account the relative competitive effects of online vs. offline sales. This methodology supplemented the FCA's analysis that ultimately led to its allowing the merger to proceed, conditional on the divestiture of a handful of stores.

Survey data were also presented in two recent telecommunications and media mergers in the United States (*DirecTV/AT&T* and *AT&T/Time Warner*). In each merger, primary research was used to examine outcomes under conditions that had not previously existed in the marketplace. In *DirecTV/AT&T*, the parties' expert conducted research using an online survey to illustrate that consumers perceived direct benefits from combining mobile and phone services with satellite services. In *AT&T/Time Warner*, the Department of Justice's ("DOJ's") expert explored the potential effects of a hypothetical blackout of major television stations resulting from a failed negotiation between content providers and distributors.

Interestingly, the courts' reliance on the two studies diverged considerably in the outcomes, with the DirecTV court accepting the results of the study, while the Time Warner court questioned the consistency of the survey results with real-world industry outcomes. In the latter case, the court rejected the survey methodology used, a decision which drew intense scrutiny afterwards. Regardless, the presentation of and reliance on such evidence emphasizes that primary research, such as surveys, should be considered in dynamic markets when existing data or prior natural experiments are insufficient for modeling competitive conditions post-merger.

III. CONCLUSION: FINDING THE RIGHT TOOLS FOR THE JOB

Antitrust law needs refinement – it always has and it always will. However, the consumer welfare standard is flexible enough to allow for the integration of economic understanding into workable legal rules, which in turn can better shape business behavior and risk taking. As we have shown, it is not enough to merely use economic analysis to address antitrust concerns. Rather, courts and antitrust authorities need to understand that certain economic tools are better for certain types of antitrust analysis. Furthermore, what has worked in the past needs to be continuously revisited, as better tools are developed that may suggest different ways of thinking about particular markets and competitive effects therein.

TECHNOCRATS, POPULISTS, HIPSTERS, AND ROMANTICS – WHO ELSE IS LURKING IN THE CORNERS OF THE BAR?

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I. INTRODUCTION

Few debates in competition law are as emotionally and ideologically charged as that on the aims of competition law. As Bork famously stated: "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law — what are its goals? Everything else follows from the answer we give."[2] Although these words were written over forty years ago, they remain as valid today as they were then. The answer to Bork's question, alas, remains as elusive as it was in the 1970s. Do we protect the competitive process as such? Or do we protect competition in the aim of maximizing economic welfare? And if so, whose welfare? Do we maybe protect competition in order to safeguard fundamental legal rights and principles, such as individual economic freedom or even the democratic process? Maybe the aim is something different altogether. Also, is it necessary to decide on one single objective, or could and should competition law pursue a multitude of aims?

The controversy does not end with the legal objective, of course. Further points of contention are how to conceptualize harm to competition, what tests to apply for assessing such harm, and under what circumstances a restriction of competition can be tolerated because it also produces beneficial effects.

Since the late 1970s, the U.S. judiciary has been guided by the consumer welfare aim and the belief that consumer harm, primarily defined in terms of higher prices, should not normally be inferred from the conduct's form, but proved by the plaintiff, save in the most egregious cases. The European Commission adopted a similar albeit more moderate approach to EU competition law in the late 1990s. Ten years ago, this so-called economic approach to competition law, which is defined by the aims and tools of industrial organization, seemed to have become the unassailable model in the Western world.

More recently, however, economic and societal upheavals, brought about by factors such as the 2008 financial crisis, the rise of Big Tech, increased market concentration and growing wealth disparity, have caused politicians and academics alike to question whether the current approach to competition law is yielding appropriate results. Adherents of the *status quo* have been quick to dismiss these challenges as antitrust hipsterism, populism and/or romanticism. The challengers, in turn, accuse the other side of technocracy.

This contribution argues that these labels are unhelpful, and that academics and politicians on both sides of the debate should prioritize an objective and fact-based discussion of the issues.

II. THE *STATUS QUO* IN THE UNITED STATES AND EUROPE

Both U.S. and EU competition law have undergone significant paradigm shifts since their inceptions. In the United States, the last major turning point occurred in the late 1970s, when then up-and-coming Chicago scholars such as Bork and Posner convinced the majority on the U.S. Supreme Court to adopt an economic approach to antitrust.[3] The Chicago School's key premise was that antitrust law should be interpreted as pursuing the same aim as mainstream economics, namely the maximization of economic welfare. Consequently, only such restrictions of competition should be deemed anticompetitive that resulted in a tangible reduction of economic welfare. The Chicago School's second proposition was that the detrimental effect on economic welfare should not normally be inferred from the investigated conduct's form, but established in each case on the basis of rigorous economic analysis, using the insights and practical tools of modern economic theory. Their key concern was that form-based presumptions were too blunt and risked outlawing conduct that did not actually reduce economic welfare. Finally, Chicago scholars argued that markets were almost always self-correcting, which greatly reduced, if not eradicated, the need for antitrust enforcement in the first place.

The U.S. Supreme Court interpreted Bork's writings as advocating a consumer welfare aim, and reinterpreted the U.S. antitrust rules as only prohibiting restrictions of competition that negatively affected consumer welfare,[4] in particular in the form of higher end prices.[5] This was a significant departure from its earlier reading of the Sherman Act, which had (also) been guided by the aim of protecting small businesses against the exclusionary conduct of powerful companies.[6] The Court further proceeded to cull its precedent on types of conduct that could be

2 Robert Bork, *The Antitrust Paradox* (New York, Basic Books Inc, 1978), 50.

3 For a brief historical overview, see e.g. Eleanor M. Fox & Lawrence A. Sullivan, "Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?," (1987) 62 *N.Y.U. L. Rev.* 336; William E. Kovacic & Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," (2000) 14 *JEP* 43.

4 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

5 While, in theory, the U.S. enforcement agencies define consumer harm more widely as also including reduced output, quality, service or innovation (e.g. FTC and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), p.4,), in practice, enforcement tends to focus on price increases.

6 *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

deemed *per se* illegal, and instead required plaintiffs to prove that the conduct caused actual consumer harm.[7] These changes not only reduced the scope of the U.S. antitrust rules, but also significantly raised the bar for enforcing the law against non-cartel infringements. Not surprisingly, these developments progressively resulted in fewer cases succeeding, and ultimately being initiated, in particular with regard to monopolization claims and merger review.

Chicago arrived in Brussels with a twenty-year delay and in a somewhat tempered version – Chicago light. In the late 1990s, responding to increasingly vocal criticism that EU competition law was too legalistic and out of touch with economic theory in comparison with U.S. antitrust law, the European Commission revised its interpretation of the substantive competition rules and developed what has become known as the "more economic" approach to EU competition law.[8] Between 2000 and 2009, it spelled out this revised approach to Article 101 TFEU and the EU Merger Regulation in numerous interpretative guidelines,[9] and issued new enforcement priorities for Article 102 TFEU.[10]

The European Commission's more economic approach is based on the same key premise as the current position of U.S. antitrust law, namely that the ultimate aim of competition law is the protection of consumer welfare. It also embraced the view that only such restrictions of competition should be deemed anticompetitive that are likely to result in a tangible reduction of consumer welfare, and that only efficiency effects which are passed on to consumers can offset such harm to competition. However, the European Commission's understanding of consumer welfare is relatively generous – both in theory and practice – and includes reduced output, lower quality, reduced innovation, and less consumer choice in addition to higher prices. Also, the internal market aim remains relevant.[11] Unlike its U.S. counterparts, the European Commission actively continues to enforce all three pillars of EU competition law, including the prohibitions against anticompetitive mergers and unilateral conduct. Also, while the more economic approach scaled back the use of legal presumptions, in particular in relation to Article 102 TFEU, unlike the U.S. Supreme Court, the European Commission did not make significant changes to the type of conduct it considers restrictive by object under Article 101 TFEU. In particular, a number of vertical agreements, such as minimum and fixed resale price maintenance or absolute territorial protection, are still considered restrictive by object, meaning that their anticompetitive effects can be inferred without in-depth economic analysis.

The more economic approach nonetheless marked a significant departure from the Commission's previous interpretation of the EU competition rules, which had been guided by a multitude of aims, including individual economic freedom, fairness, the internal market, and a rather vague and generalized notion of economic welfare. Most significantly in practice, the Commission had previously not required proof of consumer harm under any of the three pillars of EU competition law. It had further been willing to consider a broad array of beneficial effects as countervailing factors in assessments under Article 101 TFEU, including effects that were deemed desirable from the point of view of social, environmental or industrial policy. Under Article 102 TFEU, it had frequently inferred the exclusionary effects of a dominant undertaking's conduct from its form.

The changes introduced by the European Commission's more economic approach have never been entirely uncontroversial. To this day, the European Court of Justice ("ECJ") has not formally embraced the exclusive consumer welfare aim. Nor has it explicitly agreed with the other tenets of the Commission's more economic approach, i.e. that the exclusion of competitors is only problematic if it is bound to result in consumer harm, that exclusionary effects may never be inferred from the form of a dominant undertaking's conduct, or that only efficiency effects can outweigh an anticompetitive effect. And yet, the Union courts have had ample opportunity to do so over the past fifteen years. Investigated undertakings and national courts have raised these issues time and again. In 2006, the General Court ("GC") had seemed willing to take the plunge when it sided with the applicant's submission in *GlaxoSmithKline* that the objective of Article 101 TFEU was to prevent undertakings from reducing the welfare of the final consumer by restricting competition, and that an assessment under this provision therefore required establishing consumer harm.[12] However, the ECJ struck down the GC's judgment on appeal and ruled in no uncertain terms that neither the wording nor the case law supported this erroneous interpretation.[13]

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7 E.g. *Continental T. V., Inc v. GTE Sylvania Inc*, 433 U.S. 36 (1977); *State Oil v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc v. PSKS, Inc*, 127 S.Ct. 2705 (2007).

8 For a detailed analysis of the changes introduced by the more economic approach, see Anne Witt, *The More Economic Approach to EU Antitrust Law*, Chapters 4 – 7 (Hart 2016).

9 European Commission, Guidelines on Vertical Restraints, OJ [2000] C 291/1 (now OJ [2010] C130/1); Guidelines on Horizontal Cooperation Agreements, OJ [2001] C3/2 (now OJ [2011] C1/1); Guidelines on Technology Transfer Agreements OJ [2004] C101/2 (now OJ [2014] C89/3); Guidelines on the application of Article 81(3), OJ [2004] C101/97; Horizontal merger guidelines, OJ [2004] C31/5); Non-horizontal merger guidelines, OJ [2008] C265/6).

10 Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7.

11 E.g. Guidelines on the application of Article 81(3), OJ [2004] C101/9713, paras 13, 24.

12 T-168/01 *GlaxoSmithKline v. Commission* ECLI:EU:T:2006:265, paras 118, 119.

13 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v. Commission* and *Commission v. GlaxoSmithKline* ECLI:EU:C:2009:610, paras 62-64.

Since then, the ECJ has steered clear of committing itself on the matter. One cannot help but wonder whether it is deliberately trying to avoid taking sides in what has become an increasingly polarized dispute. *Intel*[14] would have been the ideal opportunity to take a stance, had the ECJ wished to do so. But instead of unequivocally stating that Article 102 TFEU does/does not require the Commission to carry out an As-Efficient-Competitor Test to weed out cases in which the dominant undertaking only excludes a less efficient and hence less worthy competitor, it merely held that, where the Commission had gone to the trouble of carrying out such a complex and costly test, the GC had to engage with its analysis on review and could not simply ignore it.[15] Likewise, rather than state that it had overruled the precedent established in *Hoffmann-La Roche* according to which exclusivity rebates were deemed outright abusive if granted by a dominant undertaking,[16] the Court merely "clarified" that in cases, in which the investigated undertaking presented substantial evidence as to why its rebates did not have an exclusionary effect, the Commission had to engage with this evidence and could not simply ignore it.[17] It avoided any discussion of the aims of Article 102 TFEU or consumer harm as a requirement of abusive conduct.

This approach of sitting on the fence has both advantages and disadvantages. On the one hand, the ECJ thereby avoids taking sides and further fanning the flames of what has become quite a bitter ideological disagreement. On the other, its reticence is not conducive to legal certainty.

Incidentally, the ECJ's Advocates General have, at times, shown considerably less restraint. They appear as divided as the rest of the legal community. In *Intel* and *MEO*, for example, Advocate General Wahl argued fervently in favor of an economic, i.e. efficiency- and effects-based, interpretation of EU competition law.[18] In *Post Danmark II*, on the other hand, Advocate General Kokott warned the ECJ against the dangers of embracing "ephemeral trends" and "Zeitgeist," and argued, no less passionately, against the more economic approach and in favor of adhering to the proved and tested legal principles established in the case law.[19]

III. ENTER THE HIPSTERS & CO

The Chicago School has had its critics all along. While some academics have always found fault with Chicago's sole focus on efficiency,[20] the main criticism has traditionally been that many of the Chicago School's key principles, while seductively simple, are too theoretical, speculative and unsupported by facts. From the 1980s onwards, academics have been trying to address some of these theoretical flaws by proposing Post-Chicago and even Neo-Chicago alternatives.[21] The European Commission endeavored to take these corrections on board when developing its own economic approach to EU competition law in the late 1990s.

In the past few years, the dispute has suddenly reignited, and taken on a new intensity and dimension that transcends academia this time. Politicians, the media, as well as a new generation of scholars are arguing quite forcefully that current competition law is no longer fit for purpose. There is, of course, the advent of e-commerce and electronic platforms, which raises the question whether the rules and assessment tools developed for brick and mortar outlets are also suitable for digital markets. There has been a flurry of government-commissioned expert reports on these issues in recent years. However, politicians are also asking more fundamental questions about the current state of competition law, and are querying whether the sole focus on consumer welfare, especially if reduced to price increases, in combination with the requirement for plaintiffs to prove such effects on the basis of complex and costly economic assessments, is really resulting in socially desirable results. Amongst the key concerns are increasing industrial concentration and market power, growing wealth disparity, privacy and competition concerns over the use of individuals' data by Big Tech companies, and the ability of a few powerful economic players to influence the political process. In 2017, the U.S. House of Representatives Democratic Leadership proposed "A Better Deal" for the American people, which promised to crack down on

14 C-413/14P *Intel. v. Commission*, ECLI:EU:C:2017:632.

15 *Supra,* note 14, paras 141, 144, 146.

16 Case 85/76 *Hoffmann-La Roche v. Commission* ECLI:EU:C:1979:36, para 89.

17 *Supra*, note 14, paras 138, 139.

18 Opinion of Advocate General Wahl in Case C-413/14 P *Intel v. Commission*, ECLI:EU:C:2016:788, para 41, and C-525/16 *MEO - Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, ECLI:EU:C:2017:1020, paras 62, 64, 90.

19 Opinion of Advocate General Kokott in Case C-23/14 *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:343, para 4.

20 E.g. Robert Pitofsky, "The Political Content of Antitrust," (1979) 127 U. Pa. L. Rev. 1051.

21 Herbert Hovenkamp, *Antitrust Policy after Chicago,* (1985) 84 *Mich. L. Rev.* 213, 225 (1985). See also the collection of essays in Robert Pitofsky (ed.), *How the Chicago School Overshot the Mark* - The Effect of Conservative Economic Analysis on U.S. Antitrust (OUP 2008).

monopolies and lax federal antitrust enforcement.[22] Likewise, U.S. Senator Elizabeth Warren is currently running her presidential campaign on an economic platform that not only promises stronger antitrust enforcement but even proposes to break up tech giants such as Amazon, Google, and Facebook.[23]

In Europe, where the consumer welfare aim has not stopped competition authorities from attempting to rein in market concentration by prohibiting mergers and abusive conduct by dominant undertakings, the primary concern currently seems that the focus on economic consumer welfare is precluding enforcers from considering other policy aims such as privacy and environmental protection, and, most recently, industrial policy. In February 2019, for example, the French and German governments published a joint manifesto in which they argued in favor of amending the current EU competition rules in order to allow the Commission to take into account industrial policy considerations in merger assessments.[24] This step needs to be seen as a reaction to the European Commission's decision to prohibit the merger between Siemens and Alstom on the basis that the combination of these two major players in the European rail industry would have restricted competition to the detriment of consumers.[25] Germany and France criticized the consumer-welfare approach underlying the decision for merely looking at the short-term effects on prices, and disregarding the effects on the competitiveness of European industries. In particular, they argued that merger law should allow for the creation of European champions in markets, in which European companies face foreign competitors that receive significant subsidies from their national governments, allowing them to win bids that companies operating under market conditions cannot match.[26] In July 2019, the French, German and Polish governments reiterated this position in another joint policy paper.[27] These arguments had been severely out of fashion for the past two decades. With the UK, a traditional advocate of open markets and a champion of the consumer welfare approach, set to leave the EU in a few months' time, it will be interesting to watch what direction EU competition law will take.

Academics have long joined the fray. In the United States, it is probably Lina Khan's 2017 paper on Amazon's unconstrained growth from a madcap idea to a titan of twenty-first century commerce[28] that has triggered the greatest media and twitter frenzy in recent years. However, she is not alone in her criticism of the current state of antitrust enforcement. There are many established academics, including Tim Wu, Jonathan Baker, and Maurice Stucke, who argue that the current approach to U.S. antitrust law, in particular, is failing society, be it because of its exclusive focus on consumer welfare, the narrow price-centric interpretation of consumer welfare, onerous standards of proof, presumption of self-correcting markets or low levels of public enforcement.[29]

Questioning the current consumer welfare standard and rule of reason approach has drawn forceful rebukes from adherents of the *status quo*. "Hipster antitrust" is probably one of the earliest labels applied to those questioning the consumer welfare standard and effects-based approach.[30] "Populist" antitrust since seems to have replaced the hipster label. It suggests that the antitrust populist, like any populist worth their salt, rejects expertise and pursues certain destructive beliefs with complete disregard for facts and science. To quote: "the populist antitrust proposals reject fundamental lessons gleaned from developments in modern economics and would send antitrust careening back to the equivalent of its Stone Age."[31] Now, romantics are said to have joined the party.[32] The defenders of the *status quo*, on the other hand, are being accused of antitrust technocracy.[33]

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22 U.S. House of Representatives Democratic Leadership, A Better Deal: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power, https://abetterdeal.democraticleader.gov/the-proposals/crack-down-on-abuse-of-power/ (Jul. 2017).

23 E.g. Astead W. Herndon, "Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook," *The New York Times* (8 March 2019).

24 Franco-German Manifesto for a European industrial policy fit for the 21st Century (February 19, 2019), www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2.

25 Commission decision of February 6, 2019 in Case M.8677 - *SIEMENS/ALSTOM*.

26 In the *Siemens/Alstom* case, the offender was CRRC, a Chinese State-owned and heavily subsidized behemoth of the rail sector.

27 "Modernising EU Competition Policy," (July 24, 2019), www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

28 Lina M. Khan, "Amazon's Antitrust Paradox," 126 Yale L.J. 710 (2017).

29 See e.g. Tim Wu, *The Curse of Bigness, Antitrust in the New Gilded Age*,(Columbia Global Reports 2019); Jonathan B. Baker, *The Antitrust Paradigm* (Harvard 2019); Maurice E. Stucke & Allen P. Grunes, *Big Data and Competition Policy*, (OUP 2016).

30 See for example Elyse Dorsey, Jan Rybnicek & Joshua D. Wright, "Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking," *George Mason Law & Economics Research Paper* No. 18-20 (Apr. 2018).

31 Elyse Dorsey, Geoffrey A. Manne, Jan Rybnicek, Kristian Stout & Joshua D Wright, "Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement," released by the Regulatory Transparency Project of the Federalist Society, April 15, 2019 (https://regproject.org/wp-content/uploads/RTP-Antitrust-and-Consumer-Protection-Populist-Antitrust.pdf).

32 Thibault Schrepel, "Antitrust Without Romance," (May 30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3395001.

33 E.g. Sandeep Vaheesan, "The Twilight of the Technocrats' Monopoly on Antitrust?," 127 *YALE L.J. F.* 980 (2018).

These labels are not entirely new. In the preface to the 2nd edition of his seminal *Antitrust Law*, Posner called the pre-Chicago approach "populist, political and ideological."[34] But is not the conviction that antitrust law should be guided by the aim of maximizing welfare alone also an ideological belief? Bork himself described his experience of being taught a price-theoretical approach to antitrust by Chicago's Aaron Director as nothing short of a "religious conversion" that turned him and his fellow students into Director's "janissaries."[35] These terms are hardly value-free.

IV. HOW HELPFUL ARE THESE LABELS?

Pitching technocrats on the one side against populists, hipsters and romantics on the other is not helpful. For one, these labels are too crude to capture the nuances of the usually quite complex arguments made by the alleged offenders. And can one really be a hipster, populist and romantic all rolled into one? Much more importantly, these labels are not conducive to a meaningful dialogue. They are all meant to belittle or denigrate the person on the other side of the argument. While hipsters are mostly deemed harmless, mainstream society also considers them eccentric at best, and silly at worst, depending on one's tolerance for alternative lifestyles. Populism has decidedly more sinister connotations. And while this particular author is an ardent admirer of Mendelssohn, Brahms, Chopin, Rachmaninoff et al., romanticism is a term that suggests an individual who is guided by emotion rather than reason. All parties concerned will probably agree that this is not a particularly desirable approach in legal or economic analysis. Finally, while most people would like to be considered experts in their field, few would like to be remembered as technocrats. Technocracy implies a form of governance that is run by individuals who are highly specialized in a narrow field of expertise, somewhat out of touch with everything else, and, above all, unelected and hence democratically unaccountable. It is not a compliment these days.

Trading insults is rarely a good way to begin a discussion, at least if the aim is to have a genuine exchange. Something that all parties should be able to agree on is that a non-judgmental, rational and, above all, fact-based discussion of the issues is the scientifically soundest approach. While the political rhetoric has become more polarized and polarizing in recent years, this is not conducive to consensus-building. Consensus, or at least acceptance, however, lie at the core of a stable legal system.

There is a lot to discuss. Amongst others, the proponents of the *status quo* need to engage with the concerns of the current countermovement and explain why the price-centric interpretation of the law, rejection of easy-to-apply *per se* rules and the current state of enforcement are unconnected to growing market concentration and wealth inequality. Alternatively, they need to explain why market concentration and wealth inequality are not something to be concerned about. They need to defend why one should worry about Type I, but not Type II errors in antitrust enforcement. And finally, they need to explain convincingly why the only valid objective of antitrust law is that of economic theory, i.e. maximum economic welfare, to the exclusion of all other benefits associated with a competitive economy, e.g. freedom of opportunity and protection of the democratic system.

The other side need to acknowledge the difficulty of translating their broader aims into clear legal concepts and propose rules that are predictable, administrable, result in the desired outcomes and are not open to political abuse. They need to address the concerns that more restrictive rules could undermine the incentives of businesses to compete and innovate, thereby depriving society of some of the very benefits the reformers are trying to achieve.

V. CONCLUSION

Europe and the United States are experiencing a fair amount of political turmoil at the moment. Unsurprisingly, the underlying public discontent is also stirring up significant concerns about the current state of competition law and policy. Not all of these are necessarily true. Not all of them are necessarily false. They raise important and complex questions that deserve to be discussed in an objective and evidence-based manner. Name-calling and pigeonholing are not going to facilitate a meaningful dialogue. And maybe a bar is not the best setting for this discussion.

34 Richard Posner, *Antitrust Law*, 2nd ed (Chicago 2001), viii.

35 Edmund W. Kitch, "1932–1970 The Fire of Truth: A Remembrance of Law and Economics at Chicago," (1983) 26 *Journal of Law and Economics* 163, 183.

THE CONSUMER WELFARE CONTROVERSY

BY BARAK ORBACH[1]

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I. INTRODUCTION

"Consumer welfare" ("CW") is the stated goal of U.S. antitrust law, standing for the proposition that competition benefits consumers. The most distinctive characteristic of the CW standard is that it has multiple interpretations, none of which is consistent with the ordinary meanings of the label "consumer welfare."[2] This characteristic has been a source of enduring confusion and controversy.[3] For example, the 2007 report of the Antitrust Modernization Commission states that "antitrust law seeks to protect competition and consumer welfare,"[4] and makes numerous references to the CW standard. In a footnote, however, the Commission recognized that "[d]ebate continues about the precise definition of 'consumer welfare,'" and noted that its use of the term did not "imply a choice of a particular definition."[5] This approach taxes credulity.

Stripped to its essentials, antitrust law concerns welfare tradeoffs resulting from certain gains and losses that profit-seeking business activities produce and, specifically, adverse effects on trading opportunities of market participants.[6] In antitrust parlance, "unreasonable restraints of trade" are restrictions on trading opportunities that harm the competitive process. For example, "cartels" are agreements among competitors not to compete in price, output, or other ways. Firms enter into such agreements to boost their profits, although they diminish trading opportunities of consumers and suppliers. Similarly, powerful firms tend to squeeze suppliers and typically (though not always) also overcharge consumers and degrade quality of products and services. Such actions intend to increase profit margins and come with negative welfare effects. Likewise, firms often merge with competitors and integrate with suppliers or distributors to improve profitability, although such transactions may reduce trading opportunities of other parties. The CW controversy consists of disagreements over the criteria used to evaluate such welfare tradeoffs; that is, the criteria that define harm to competition in violation of antitrust law.

Two polar approaches — *laissez faire* and fairness — have dominated the CW controversy. *Laissez faire* advocates believe that, with very narrow exceptions, the pursuit of profit is inherently competitive and serves society, even when some parties incur collateral losses. By contrast, fairness advocates tend to identify losses resulting from the pursuit of profit as consequences of anticompetitive conduct, namely, "wealth transfers." Most antitrust experts, however, hold more nuanced approaches to welfare tradeoffs, which are on the continuum between the *laissez faire* and fairness positions. They recognize that markets are not as competitive as *laissez faire* ideologues believe and that the competitive process has "winners" and "losers," contrary to the expectations of fairness enthusiasts.

The CW standard established that only certain types of economic effects may constitute competitive harm. When Robert Bork introduced the CW standard and, later, when the Supreme Court embraced the standard, fairness perceptions governed antitrust law.[7] Judicial opinions frequently emphasized welfare losses of small businesses, competitors, and other parties. Under the CW standard, the key consideration is losses that consumers suffer resulting from price increases or reduced output. This standard was conceived and promoted together with a set of premises that (1) are skeptical of the likelihood that the pursuit of profit could result in competitive harm; and (2) stress potential harms to prosperity that restrictions on the pursuit of profit may cause. For such premises, applications of the CW standard are largely consistent with the *laissez faire* antitrust vision.

2 Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. Competition L. & Econ. 133 (2011).

3 Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 Antitrust L.J. 881 (2014); Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253 (2013).

4 Antitrust Modernization Comm'n, Report and Recommendations 2 (2007).

5 *Id.* at 26, n. 22.

6 See Aaron Edlin & Joseph Farrell, *Freedom to Trade and the Competitive Process*, *in* 1 International Antitrust Economics 298 (Roger Blair & D. Daniel Sokol, eds., 2014).

7 Barak Orbach, *Antitrust Populists: Their Appeal, Visions, and Delusions* (forthcoming); Barak Orbach, *The Present New Antitrust Era*, 60 Wm. & Mary L. Rev. 1439 (2019).

II. PRESSURES TO EXPAND THE ANALYTICAL FRAMEWORK

One of the defining characteristics of the past decade is the changing public attitudes toward large businesses and their executives. Since the Great Recession (2007-2009), public pressures to increase scrutiny of large businesses and hold executives accountable for corporate wrong-doing have been mounting. Antitrust law has not escaped this trend. It is at an historical inflection point.[8]

In recent years, old fairness claims gained new life and traction. Contemporary critics of the CW standard ("neo-Brandeisians") argue that the focus on price and output neglects other forms of losses, such as negative effects on quality, innovation, economic disparities, and the social fabric. They also argue that antitrust law should consider effects on a broader set of parties, including competitors, suppliers, employees, communities, and democratic institutions.

In August 2018, Senator Elizabeth Warren, one of the leading voices of the progressive movement, introduced a bill — *The Accountable Capitalism Act*,[9] in the spirit of President Roosevelt's (unsuccessful) Bureau of Corporations.[10] The bill proposed to establish the "Office of the United States Corporations" within the Department of Commerce. It required "large entities" to obtain a "charter" from the Corporations Office and declared that the purpose of chartered large entities shall be "creating a general public benefit." Warren's bill defined "general public benefit" as "a material positive impact on society resulting from the business and operations of [the] corporation, when taken as a whole." The bill further stated that the fiduciary duties of directors and officers of chartered large entities would include an obligation to balance the "the pecuniary interests of the shareholders . . . with the best interests of persons that are materially affected by the conduct of the . . . corporation," such as employees, suppliers, customers, "community and societal factors," and the "local and global environment." The Accountable Capitalism Act was not accompanied by necessary details concerning balancing criteria and the federalization of corporate law. It epitomizes the essence of political populism — the exploitation of social divides to recruit political support through the promotion of thin ideas, exaggerations, and anxieties to attack the establishment and elites.[11] Warren's antitrust proposal applies this vision to competition policies.[12]

In August 2019, the Business Roundtable ("BRT"), a trade association of CEOs of major U.S. companies, released a statement about the purpose of a corporation.[13] This statement was signed by 181 CEOs who committed "to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities, and shareholders."[14] It superseded prior BRT statements which declared that corporations exist principally to serve shareholders. The statement, thus, rejected the shareholder primacy principle that Milton Friedman, a *laissez faire* icon, popularized.[15] It remains to be seen whether and how companies would withdraw from the shareholder primacy principle, and whether such ideas would affect corporate law. For the time being, the BRT statement signals that Corporate America recognizes that fairness is an important governance consideration.[16] In the context of the CW controversy, the BRT statement is yet another indication that *laissez faire* has been losing ground in the United States.

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8 Orbach, *Antitrust Populists*, *id*; Orbach, *The Present New Antitrust Era*, *id.*; Barak Orbach, *D&O Liability for Antitrust Violations*, Santa Clara L. Rev. (forthcoming); Barak Orbach, *Antitrust Populism*, 14 NYU J. L. & Bus. 1 (2017).

9 The Accountable Capitalism Act, S. 3348, 115th Cong. 2d Sess. (Aug. 15, 2018). See also Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, Wall St. J., Aug. 15, 2018, at A17.

10 Arthur M. Johnson, *Theodore Roosevelt and the Bureau of Corporations*, 45 Miss. Valley Hist. Rev. 571 (1959).

11 Orbach, *Antitrust Populists*, *supra* note 7; Orbach, *Antitrust Populism*, *supra* note 7.

12 Sheelah Kolhatkar, *How Elizabeth Warren Came Up with a Plan to Break Up Big Tech*, New Yorker, Aug. 20, 2019.

13 Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 2019).

14 Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans'* (press release, Aug. 19, 2019). See also David Benoit, *Top CEOs See a Duty Beyond Shareholders*, Wall St. J., Sept. 20, 2019, at A1.

15 Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times Mag., Sept. 13, 1970, at SM17.

16 See Larry Fink's 2019 Letter to CEOs: Profit and Purpose (outlining BlackRock's approach to corporate purpose).

III. THE SINGLE GOAL MOVEMENT

The Chicago School of thought promoted and facilitated a stunning takeover of antitrust law by *laissez faire* convictions disguised as economic principles. The School formed and gained popularity during the "fairness era" of antitrust law, which took place roughly from 1935 to 1975.[17] In this period, mistrust of markets, concerns about market concentration, fears of bigness, and notions of perceived fairness guided antitrust law. For Chicagoans and their followers, these sentiments represented misconceptions and corrupting influences of anti-free market forces. They produced voluminous literature portraying the antitrust enterprise as "dysfunctional and dangerously out of control," criticizing antitrust's hostility to business, and ridiculing enforcement actions.[18]

Robert Bork was among the early disciples of the Chicago School. He published his first antitrust paper in 1954, while serving as a research associate at the Antitrust Project at the University of Chicago Law School.[19] In 1962, Bork joined Yale Law School and published a series of provocative antitrust works, concluding with his seminal book, *The Antitrust Paradox*.

In Bork's thinking, growing tensions between policies that preserved competition and policies that suppressed competition placed antitrust at "war with itself."[20] He initially described this conflict as a "crisis in antitrust" and later named it the "antitrust paradox." Antitrust's internal contradictions, Bork argued, stemmed from "intellectual decadence" and "the notion that . . . courts may properly implement a variety of mutually inconsistent goals, most notably the goals of consumer welfare and small business welfare."[21] "A multiplicity of policy goals," Bork observed, seemed "desirable to some commentators," but required criteria to address inconsistencies and contradictions in specific cases.[22] Such criteria did not exist then and have never been offered. The growing reliance on premises and doctrines that suppressed competition, Bork wrote, degraded the resilience of our capitalist system:

> [T]he general movement has been away from legislative decision by Congress and toward political choice by courts, away from the ideal of competition and toward the older idea of protected status for each producer, away from concern for general welfare and toward concern for interest groups, and away from the ideal of liberty toward the ideal of enforced equality. . . . [T]hese trends . . . should be recognized and reversed, for they are ultimately incompatible with the preservation of a liberal capitalist social order.[23]

The starting point of Bork's antitrust philosophy was that antitrust was necessary to "preserve a free market system."[24] His policy prescriptions, however, were rife with propositions and premises that dismiss the need for antitrust enforcement. Chicagoans and their followers arguably found logic in this paradoxical philosophy and insisted that it rests on facts, data, and sound economic principles. In actuality, Bork and other Chicagoans sought to establish order and logic in antitrust law, but, blinded by their political agenda, they called to reorient the antitrust paradox.

17 See Orbach, *Antitrust Populists supra*, note 7; Orbach, *The Present New Antitrust Era*, *supra* note 7.

18 William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the US Antitrust System in the 1970s*, 79 Antitrust L.J. 856 (2014).

19 Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. Chi. L. Rev. 157 (1954).

20 Robert H. Bork, The Antitrust Paradox 7, 18, 407, 418 (1978); Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, Fortune, Dec. 1963, at 138.

21 Bork, The Antitrust Paradox, *id.* at 408, 418.

22 *Id.* at 418.

23 *Id.* at 10-11.

24 *Id.* at 418.

IV. CRITIQUE OF THE CW STANDARD

In Bork's framework, "competition" was a "shorthand expression for consumer welfare," which, in turn, meant "total surplus." This standard proved confusing and controversial for several reasons.

(1) Incorrect Factual Claims. Bork's most original contribution to antitrust law was the CW standard. The originality of the standard, however, was not "intellectually respectable" (to use Bork's language). To support the CW standard, Bork argued that "[t]he language of the antitrust statutes, their legislative histories," and administrability considerations "all indicate" that antitrust law "should be guided solely by the criterion of consumer welfare."[25] Bork clearly believed that his proposal was a good one and, hence, practical. His claims about the statutory language and legislative history were also consistent with this conviction, but factually incorrect. Congress passed the antitrust statutes responding to political pressures to act against large businesses ("trusts"), which were a new phenomenon at the turn of the nineteenth century. The primary motivation behind the enactment of the antitrust statutes, thus, was concerns about large businesses and distributive effects.

In *Reiter v. Sonotone Corp.* (1979), the Supreme Court held that consumers had a right to pursue treble damages for antitrust violations, stating that "Congress designed the Sherman Act as a 'consumer welfare prescription'" and citing Bork as the authority for this claim.[26] It is far from clear that *Reiter* intended to embrace Bork's misleading interpretation of the phrase "consumer welfare."

(2) Welfare vs. Surplus. In economics, "welfare" is a measurement of well-being, whereas "surplus" is a measurement of net gains in a simplified economic framework. In equilibrium, the consumer surplus is the difference between the consumers' willingness to pay and what they pay, and the producer surplus is the difference between the sellers' revenues and costs. That is, surplus does not necessarily include certain welfare factors. Where the transacting parties are informed and rational, there are no effects on third parties (externalities), and markets are static, the terms "welfare" and "surplus" are loosely equivalent. But when any of these conditions does not hold, notions of "surplus" do not capture all welfare effects. This is the common reality in certain markets, such as markets for addictive pharmaceuticals, tobacco products, financial products, firearms, healthcare services, and others.

Critics of the CW standard argue that the standard is too narrow because information problems, bounded rationality, and externalities are prevalent, and innovation is the key to prosperity. Such assertions reflect gross misunderstanding of the regulatory system and unrealistic expectations about what competition policies can accomplish. The claims about information problems, bounded rationality, and externalities trivialize the complexity of these considerations for which we have consumer protection laws, safety regulations, environmental policies, employment laws, and other specialized regulatory areas. The concern about innovation has some validity but is too broad to be useful. The relationship between competition and innovation is complex. Market competition may influence the degree of and intensity of inventive activities, but not always in the same direction and it is not entirely clear how.

(3) Distributive Effects and Economic Disparities. It is difficult to rationalize the claim that, in antitrust, "consumer welfare" means "total surplus." An increase in the size of the social pie does not exclude the possibility that the consumers' slice got smaller. Under certain conditions, the total surplus may remain unchanged or even grow, despite decreases in the consumer surplus. This may happen when a merger produces efficiencies and results in price increases, when a seller engages in price discrimination, and in other settings.

The total surplus standard is somewhat analogous to the gross domestic product ("GDP") metric that has been a key gauge of national prosperity since the 1930s.[27] Productivity growth measured by GDP per hour worked defines a country's ability to improve the standard of living over time. But national prosperity does not necessarily trickle down effectively and quickly. The rise in economic disparities in recent decades illustrates the point.

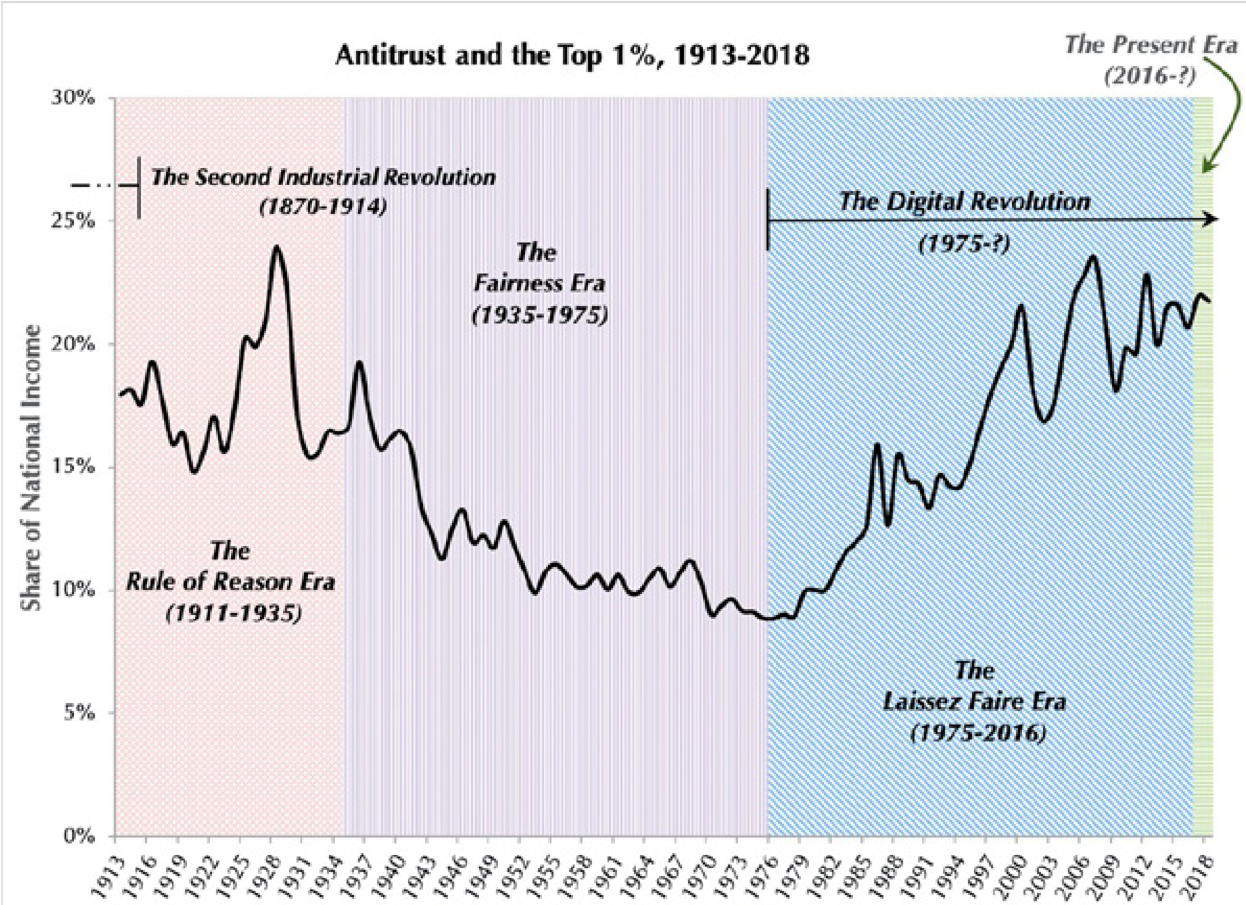
In the United States, income inequality was relatively moderate during antitrust's fairness era (1935-1975) and high in other antitrust eras, when antitrust enforcement was lax.[28] During the past four decades — the *laissez faire* era — income inequality has soared.

25 *Id.* at 57.

26 *Reiter v. Sonotone Corp.*, 442 US 330, 343 (1979).

27 Ehsan Masood, The Great Invention The Story of GDP and the Making (and Unmaking) of the Modern World (2016).

28 Orbach, *Antitrust Populists supra*, note 7; Orbach, *The Present New Antitrust Era, supra* note 7.



* Sources: Emmanuel Saez & Thomas Piketty (income inequality data); Orbach, *The Present New Antitrust Era* (2019) (antitrust eras); Orbach, *Antitrust Populists* (forthcoming) (antitrust eras)

Laissez faire enthusiasts insist that increases in total surplus are passed on to consumers and efficiency gains trickle down to employees and other stakeholders. In reality, however, there are significant impediments to the diffusion of wealth. The 2019 BRT statement about the purpose of a corporation is consistent with this observation. It recognizes that, in the absence of policies addressing welfare effects, wealth does not "trickle down" sufficiently well.

On the opposite end of the ideological spectrum, the appeared relationship between the rigor of antitrust enforcement and income inequality inspired claims that antitrust law should consider welfare effects experienced by all stakeholders, including suppliers, employees, and competitors. But the appeared relationship is somewhat misleading.

Lax antitrust enforcement undoubtedly enables wealth transfers, but it is hardly the only source of growing economic disparities. First, changes in the aggressiveness of antitrust enforcement have historically paralleled changes in other national economic policies, including the Supreme Court's approach of corporate rights.[29] There are no reliable methods to measure the effects of antitrust policies on income inequalities. Second, in periods of rapid technological change, the distribution of welfare gains and losses is heavily skewed: successful entrepreneurs and their backers capture a portion of the gains and accumulate wealth, while large segments of the population experience losses arising from automation and displacement of old technologies. When the welfare losses are large, the productivity growth may be disappointing. Economists call this phenomenon the "productivity paradox."[30] Stated differently, in periods of rapid technological change, the technological divide is one of the primary sources of economic disparities. Fairness advocates fail to explain how antitrust policies could address effectively economic disparities caused by the technological divide.

29 Barak Orbach, *State of Inaction: Regulatory Preferences, Rent, and Income Inequality*, 16 Theoretical Inq. L. 45 (2015).

30 Robert M. Solow, *We'd Better Watch Out*, N.Y. Times Book Rev., July 12, 1987, at 36 ("You can see the computer age everywhere but in the productivity statistics.")

(4) The Reorientation of the Antitrust Paradox. Until the adoption of the CW standard, antitrust's "basic premises were flatly inconsistent with one another, some of them leading to the preservation of competition and others to its suppression."[31] For example, courts frequently said that antitrust law intended "to promote competition through the protection of viable, small, locally owned business," recognizing that the "maintenance of fragmented industries and markets" may result in "occasional higher costs and prices."[32] Bork forcefully pointed out that the maintenance of fragmented industries and protection of small competitors did not serve consumers.

The transformation of antitrust law, however, did not resolve the conflict between policies that preserve competition and policies that suppress competition. It merely aligned the antitrust paradox with *laissez faire* convictions rather than fairness sentiments. The present guiding principle of antitrust law rests on the belief that, in antitrust law, the costs of false positives are prohibitively high, whereas the costs of false negatives are negligible. Other premises follow this belief: markets self-correct through entry; business practices prevalent in competitive markets, such as vertical restraints, are unlikely harm competition; market concentration has no effect on competition; cartels are unstable; agreements concerning intellectual property rights encourage innovation; and exclusionary practices are not economically viable.

V. THE GREAT MARKETING PLOY

Standing alone, the CW standard could be useful to evaluate harm to competition. But, as explained, together with the accompanying premises that direct antitrust law, the CW standard is a misleading concept. The present constellation of antitrust premises and labels dresses ideological convictions in economic narrative.

The transformation of antitrust law in recent decades was an element of a general trend in American jurisprudence. Since the mid-1970s, and at a faster pace since the 2005 confirmation of Chief Justice Roberts, the U.S. Supreme Court has been persistently expanding corporate rights at the expense of individual rights, while increasingly relying on formalistic reasoning. The Court's antitrust jurisprudence has evolved in a similar fashion. Since the mid-1970s, the Court has been persistently narrowing the scope of antitrust law and adopting procedural standards that are favorable to antitrust defendants.

The distinctiveness of the transformation of antitrust law is in the belief that it was guided by sound economic principles. The Supreme Court has repeatedly stated that it feels "relatively free to revise" antitrust precedents, "as economic understanding evolves" and, therefore, antitrust precedents have "less-than-usual force."[33] Scholars and practitioners often say that the transformation of antitrust law turned the discipline into a "branch of economics."[34] These declarations are largely rhetorical. They echo assertions of the Chicago School, an advocacy arm of the *laissez faire* movement.[35] The decline of the Chicago School in the past three decades and the broad renunciation of its core premises are yet to influence the Supreme Court's jurisprudence, including its approach to antitrust law. Present antitrust law is far more consistent with the Court's protective approach to corporate rights than with economics.

Two impressive accomplishments of the Chicago School obfuscated the ideological nature of its premises and policy prescriptions. First, presenting *laissez faire* beliefs as scientific economic principles, the Chicago School successfully promoted a false equivalence between economics and ideological objections to legal restrictions on private economic activities. Second, Chicagoans and their followers established an erroneous premise that, in antitrust law, "populism" means liberal antipathy to business, implying that the Chicago Revolution was not populist. *Laissez faire* advocates have used these misleading propositions to advance a third claim: lax antitrust enforcement rests on sound economic policies, whereas vigorous enforcement reflects unfocused political agenda and noneconomic values.[36] The CW standard exemplifies this dubious technique of marketing political agenda through quasi-scientific narrative.[37]

31 Robert H. Bork, The Antitrust Paradox iv (rev. ed. 1993).

32 *Brown Shoe Co. v. United State*, 370 US 294, 344 (1962). See also *United States. v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945) (Hand, J.) (writing that, in addition to "economic reasons which forbid monopoly, . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results" and the legislative intent "to put an end to great aggregations of capital because of the helplessness of the individual before them.").

33 *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2412–13 (2015). See generally Barak Orbach, *Antitrust Stare Decisis*, 15 Antitrust Source 1 (October 2015); Barak Orbach, *The Durability of Formalism in Antitrust*, 100 Iowa L. Rev. 2197 (2015).

34 See, e.g. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 Geo. L. J. 305 (1987); Richard A. Posner, Antitrust Law viii (2d. ed. 2001) ("Today, antitrust law is a body of economically rational principles."); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979); Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 Mich. L. Rev. 325 (1968).

35 See Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J. L. & Econ. 163 (1983); Aaron Director, *The Parity of the Economic Market Place*, 7 J. L. & Econ. 1 (1964); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. Rev. 281 (1956).

36 Orbach, *Antitrust Populism*, *supra* note 7.

37 Orbach, *Antitrust Populists*, *supra* note 7.

VI. CONCLUSION

The CW controversy, I argue, offers important cautionary lessons for contemporary debates about the future of antitrust law: every period of policy radicalization is followed by corrections in doctrine and methodology. This pattern presents significant risks. Neglected needs for reforms caused by radicalization create political capital for ideologues and opportunists who are effective in mobilizing public frustrations and anxieties. The history of antitrust law demonstrates that, despite the enormous significance of competition policies to economic prosperity and stability of our liberal democracy, zeal, opportunism, and conformity have persistently compromised the effectiveness and integrity of antitrust law.

In recent years, messengers of the progressive movement successfully capitalized on public anxieties to energize calls for overdue reforms. Their political effectiveness, however, does not imply that their policy prescriptions are sound and informed. The antitrust branch of the progressive movement, the neo-Brandeisian approach, utilizes the populist technique of the Chicago School that neo-Brandeisians condemn. Chicagoans and their followers introduced the CW standard as a trojan horse to conceal crude hostility to any constraints on profit-seeking activity. Today, neo-Brandeisians calls on antitrust to abandon the CW standard and adopt policies in the spirit of the fairness era's hostility to large businesses and efficiencies. Both genres are populist in their style and substance.

In periods of frustrations and anxieties, disruptive reforms may appear tempting while disciplined reforms appear timid and lackluster. The appeal of populist movements builds on such excitements that promises for disruptive reforms produce. The Chicago School escaped the stigma of populism by claiming to represent science (economics) and demonizing the progressive antitrust vision. Neo-Brandeisians have generated political energy necessary for disruptive reforms but yet to form a viable plan to convert the federal judiciary, antitrust technocracy, and antitrust experts. In the absence of a plan similar in its effectiveness to Chicago's great marketing ploy, neo-Brandeisians may have limited influence on the design of antitrust reforms that they enabled.

The modernization of antitrust law is long overdue and should include refinement of the goal of antitrust. The CW standard suffers from two critical shortcomings: (1) it has multiple interpretations, and (2) its applications are governed by ideological premises. These flaws require corrections that would clarify the goal of antitrust law and relieve it from the shackles of *laissez faire* ideology. It may be beneficial to retire the "consumer welfare" label for its confusing nature. The distinctions among consumers, suppliers, labor, and sellers are not as sharp as textbooks suggest.[38] An adequate analysis of the competitive process should focus on the vitality of trading opportunities of market participants that tend to be interrelated.

The stated goals of competition law outline the criteria that the courts and agencies should use to evaluate certain welfare tradeoffs resulting from the pursuit of profit. These criteria may reflect fairness perceptions in the spirit of the progressive movement. Most serious antitrust thinkers, I believe, do not support this idea and have concerns about the social costs of disruptive reforms. Studies of competition policies persistently show that a multiplicity of goals leads to uncertainty about enforcement standards. Tensions and conflicts among values are inevitable and balancing criteria are inherently imprecise. The advantage of a refined single standard, which may be called the CW standard, is that it could (and should) improve the analysis of welfare tradeoffs without racking the antitrust enterprise. Such clarification, I argue, should align the goal of antitrust law with antitrust's core task: protecting the competitive process by banning business agreements, practices, and transactions whose adverse effects on trading opportunities unreasonably impair the process.

38 Orbach, *The Antitrust Consumer Welfare Paradox*, *supra* note 2.

STRENGTHENING ANTITRUST ENFORCEMENT WITHIN THE CONSUMER WELFARE RUBRIC

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1 Professor of Law, Seton Hall University School of Law. I thank Yee-Wah Chin, Charles Sullivan and Bill Wang for their insightful comments.

I. INTRODUCTION

Even the harshest critics of the digital giants — Facebook, Amazon, Apple, Google, and Microsoft — will likely acknowledge that digital technology has greatly benefited consumers and businesses alike, and has transformed much of the global economy. The dominance of these large digital platforms in their respective core areas and the breadth of their activities across multiple markets, however, is troubling.[2] From a competition policy perspective, although concentration can be efficient and thus benefit consumers, the absence of competition over time carries costs. Economic theory suggests that in the long-run, without the constraint of competition, dominant incumbents have less incentive to innovate or to perform their best. Consumers also lose choice and the opportunity to benefit from potential innovations of new companies that have difficulty entering the market or scaling up. Some concerns extend beyond the economic: a number of critics also attribute a range of non-economic, social, and political ills to the largest digital companies' unbridled power.[3]

During this period of unparalleled growth in the technology sector, antitrust enforcement in the United States has been surprisingly lax. Google, Facebook, Apple, Amazon, and Microsoft, in the aggregate, managed to make over 500 acquisitions in the past ten to fifteen years, most without any challenge from either American or European antitrust enforcers or at most with only a few conditions attached.[4] Some of these acquisitions have allowed already dominant platforms to consolidate their positions in a core market, eliminate a potential future rival, or expand into adjacent spaces.[5] Exacerbating the problem is that natural entry barriers into these markets are already unusually high because of a combination of factors, including the centrality of data to platform markets, which gives data-rich incumbents a huge competitive advantage over would-be rivals, economies of scale and scope, and significant network effects.

Alarm over the enormous power of the tech platforms, the difficulty of entry into these markets, and frustration over decades of antitrust permissiveness, has led to a healthy discussion of ways to reinvigorate antitrust and to address the special competition challenges of the digital markets. Some critics, going further, have frontally challenged the "consumer welfare" paradigm that underpins application of the antitrust laws. They argue that the consumer welfare standard is incapable of addressing the special economic problems of concentration and power in digital markets because of the standard's perceived exclusive focus on consumers and on short-term *price* effects, ignoring non-consumers and non-price effects such as quality and innovation and data-related effects.[6] Other critics, populists who are often referred to as "New Brandeisians" or "hipster" antitrusters, charge more broadly that the standard is fundamentally flawed in that it does not address political power, or the social consequences of concentration itself and of the tools the platforms have created.[7] Among the non-economic harms most often noted are wealth and income inequality, privacy intrusions, data security breaches, political corruption, and the proliferation of "fake news" and hateful messages.

Antitrust enforcement, indeed, has been far too lax. I argue, however, that stronger antitrust enforcement is possible within the consumer welfare rubric because that standard is capable of a broader reach than is typically assumed. Antitrust enforcement has fallen short, not because of the legal deficiencies of consumer welfare but because of practical problems of implementation and other factors. Finding solutions to those challenges would be a less disruptive and more effective response than abandoning a paradigm that is conceptually sound and has been incorporated into competition policies throughout the world. To the extent that there may be a few intractable problems in digital markets that competition cannot solve, we could consider the possibility of limited legislation and regulation as a supplement to antitrust, which would be preferable to a wholesale displacement of the consumer welfare standard.

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2 For example, recent data shows that Google's search engine handles approximately 90 percent of all general internet searches worldwide. See Statista, https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/. Amazon garners 83 percent of e-book sales and 41 percent of all e-commerce retail sales in the U.S. See Authorearnings.com, http://authorearnings.com/report/february-2017/ & Statista, https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/. Facebook is by far the most popular social network worldwide outside of China, with 69 percent of the worldwide social media market. See StatCounter, http://gs.statcounter.com/social-media-stats/all/united-states-of-america.

3 See, e.g. Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 21 (Columbia Global Reports 2018); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 Harv. L. & Pol'y Rev. 235, 235-36 (2017).

4 See Nicolas Petit, *Technology Giants, the "Moligopoly" Hypothesis and Holistic Competition: A Primer*, at 28-29, Oct. 20, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856502; Unlocking Digital Competition: Report of the Digital Competition Expert Panel 91 (Mar. 2019) [hereinafter, the Furman Report].

5 For example, Facebook's acquisition of Instagram in 2012 and Google's acquisition of DoubleClick in 2007 are both examples of a large digital platform incumbent acquiring a smaller firm operating in an adjacent space which could have developed into a competitive force against the incumbent in the future.

6 See, e.g. Maurice E. Stucke & Allen P. Grunes, Big Data and Competition Policy (Oxford U. Press 2016).

7 For commentaries generally considered to be New Brandeisian, see, e.g. Lina M. Khan, *The Ideological Roots of America's Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 127 Yale L.J. Forum 960 (2018); Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 Yale L.J. Forum 980 (2018); Ramsi Woodcock, *Inconsistency in Antitrust*, 68 U. Miami L. Rev. 105 (2013).

It is true that consumer welfare cannot reach transgressions and non-economic harms that are unrelated, or only tangentially related, to market competition, but no law can be (or should be) expected to perform tasks for which they were not designed. Tackling those problems directly, through use of other existing laws or new laws or regulations specifically designed to address them, would be more productive and less likely to have unintended and undesirable consequences.[8]

II. THE BROAD, IF NOT FULLY UTILIZED, SCOPE OF CONSUMER WELFARE

The "consumer welfare" paradigm has been the economic underpinning of American antitrust law since the Supreme Court first endorsed it in 1979,[9] and it has been generally embraced by competition authorities in Europe and other countries.[10] Curiously, however, the term has no uniform, or even clear, definition in antitrust law.[11] Under Robert Bork's initial narrow conception as articulated in *The Antitrust Paradox*,[12] the term was almost synonymous with allocative efficiency, and thus only practices that artificially restrict output would be deemed to decrease consumer welfare.[13] But it is clear that the term does not have that narrow meaning in practice.[14] As used in antitrust, "consumer welfare" is simply a term of art that expresses the general principle that the antitrust laws are for the protection of competition, because the distortion of competition ultimately harms consumers,[15] and it is hardly as restrictive in scope as many believe.

A. "Consumer" Welfare Extends Beyond Literal Consumers

The consumer welfare standard does not limit antitrust law to the protection of *literal* consumers but clearly protects business purchasers against the harms of restraints on competition as well. This includes intermediate purchasers in the supply chain regardless of whether an intermediate purchaser's higher prices feed through to the final purchaser.[16] Intermediate purchasers and even end-use business purchasers, of course, are not literally consumers.

"Consumer" welfare, in fact, extends beyond considering how sellers' conduct impacts the welfare of buyers, but also permits antitrust law to act against distortions of the competitive process on the buyer side that have harmful effects on *sellers*. For example, conspiracies among purchasers to reduce prices paid to sellers of inputs have long been treated as antitrust violations,[17] without the need to establish higher prices or reduced output in the downstream end-use market. The law against monopolization, likewise, captures *monopsony* as well.[18]

8 For example, it is not even clear that breaking up Facebook would likely result in less, rather than more, fake news. With more social media platforms vying for our attention, the incentive to screen out fake news might be even further reduced because many consumers gravitate to the loudest and the most sensational "news," and so competition might not alleviate the harm but actually increase it.

9 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). See also *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 367 (1982).

10 See, e.g. *The Furman Report*, *supra* note 4.

11 Among antitrust scholars, the debate usually revolves around whether "consumer welfare" means a *total* surplus standard, which was how Bork used it, or a *consumer* surplus standard. See Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336 (2010). Total welfare looks at the combined consumer and producer welfare, while consumer welfare disregards producer welfare and only looks at the effect on consumers.

12 Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself (1978)

13 In fact, Bork meant "total surplus" when he used the term "consumer welfare," that is, the sum of consumer and producer surplus. In other words, under Bork's interpretation, conduct would be condemned only if any loss to consumers is not offset by any gain to producers. See Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 90-160 (1978) (discussing the neoclassical efficiency model).

14 See, e.g. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. Competition L. & Econ. 133 (2011)

15 See, e.g. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (speaking of the need to show more than harm to competitors; "it must harm the competitive *process* and thereby harm consumers"); *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 of the H. Comm. on the Judiciary*, 115th Cong. (2017) (opening statement of Carl Shapiro, Professor of Business and Economics, Haas School of Business, U. Cal. Berkeley) (the consumer welfare standard "means that a business practice is judged to be anticompetitive if it disrupts the anticompetitive process and harms trading parties on the other side of the market").

16 This is self-evident from the American "direct purchaser" rule, which restricts recovery of damages in an antitrust action to a direct purchaser, even if the direct purchaser passes on its higher costs resulting from the seller's anticompetitive conduct to the indirect purchasers (the direct purchasers' customers). The doctrine obviously would not exist if intermediate buyers were not considered "consumers" who could be harmed by antitrust violations. See, e.g. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

17 See, e.g. *Mandeville Island Farms v. American Crystal Sugar Inc.*, 334 U.S. 219 (1948).

18 See, e.g. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 324-25 (2007) ("Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits.").

On the important issue of workers, antitrust enforcers and private plaintiffs have challenged collusion among employers based on adverse effects on workers, essentially treating harms to workers (who are sellers in the labor market) as cognizable anticompetitive effects, without linking lower employee wages to higher prices or reduced output in a downstream product market.[19] The best known of the enforcement actions involve the "no poaching" agreements among several high-tech employers to refrain from soliciting each other's employees.[20] Clearly, if only harm to consumers in the literal sense were cognizable, these cases might not have been brought since finding an adverse effect in the downstream end-product market resulting from depressed wages of workers involved in bringing those products to market (or lower prices for other inputs) would have been an uphill battle. In short, the record of enforcement actions in the U.S. and court decisions show that the word "consumer" in consumer welfare is not used literally and reaches more broadly than is popularly believed.

The more challenging, related, issue stems from the antitrust maxim that antitrust laws protect competition, not competitors,[21] which is often interpreted to mean that harms to competitors from a dominant firm's disruptions to competition do not count unless there is discernible adverse impact on consumers. I believe that this interpretation is hyper-literal and does not serve the ultimate goal of antitrust, which is to foster competition to benefit consumers and the economy. In digital economy markets where technologies frequently change and innovations can revolutionize the nature of existing products and services, protecting competitors from unfair strategies by dominant incumbents may be inseparable from protecting competition. Without competitors, it is hard to know whether a dominant firm's product is the best that technology can produce, or whether improved (or better, but different) products and services are feasible but have not been introduced because of an incumbent's dominance and exclusion of potential rivals.

Even if there is no evidence of direct and immediate consumer harm from a dominant firm's business practice that disrupts the competitive process and harms a competitor, I believe that indirect harm to consumers in the long run can be presumed. Harm to a competitor stunts the competitor's ability to invest in its own growth and development, and consumers, in turn, potentially lose out on new products and services that never emerge. The real difficulty here is making the factual distinction between harm to competitors that is based on competition on the merits, which antitrust law does not protect against, and harm from business strategies that is not so based. But this difficulty does not stem from a defect within the consumer welfare standard itself.

B. The Consumer Welfare Standard Is Capable of Capturing Non-Price Effects

Another popular critique of the consumer welfare standard comes from the misunderstanding that it is restricted to assessing short-run price and output effects. The standard, in fact, is not so restricted but is capable of taking in nonprice considerations, including quality, choice and innovation, because these features have value to consumers and clearly impact their welfare.[22] It is true that nonprice and dynamic harms, unlike higher prices, are unquantifiable and often not readily observable; that, along with high evidentiary standards currently imposed on plaintiffs, means that antitrust cases lacking any price effects are very difficult to establish and rarely brought.

The difficulty of showing nonprice harms makes antitrust enforcement in digital platform markets especially difficult because, in these markets, the monetary price of products and services is often zero for consumers. Where the price is zero, any harm from alleged anticompetitive conduct or mergers would necessarily be reflected in quality, innovation or other nonprice factors, not in price. Even in markets where the price to consumers is not zero, firms in the digital economy tend to compete more on innovation and quality than on price. The ability to consider the effects of conduct or mergers along nonprice dimensions, then, is critical in the digital economy.

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19 Private class actions brought include: *Carruth v. Knorr-Bremse*, No. 2:18-CV-00469-CRE (W.D. Pa. April 18, 2018) (affecting rail equipment employees); *In re Broiler Chicken Grower Litig.*, No. 6:17-CV-00033-RJS (E.D. Okla. Sept. 1, 2017) (affecting chicken growers); *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-04857, (June 28, 2017) (affecting fast-food employees); *Bautista v. Carl Karcher Enters., LLC*, No. BC649777 (Cal. Super. Feb. 8, 2017) (affecting fast-food employees); *Seaman v. Duke University*, No. 1:15-CV-462 (M.D.N.C. filed June 9, 2015) (affecting university faculty); *In re High-Tech Employee Antitrust Litig.*, 856 F.Supp.2d 1103 (N.D. Cal. 2012) (affecting high-tech employees); *Fleischman v. Albany Medical Center*, No. 06-CV-0765 (Sept. 7, 2006) (affecting nurses).

20 See, e.g. *United States v. Adobe Sys., Inc.*, No. 10-cv-01629, 2010 WL 11417874 (D.D.C. Sept. 24, 2010); Complaint, *United States v. Lucasfilm Ltd.*, No. 10-cv-02220, 2010 WL 5344347 (D.D.C. Dec. 21, 2010); Complaint, *United States v. eBay, Inc.*, No. 12-cv-5869, 2012 WL 5727488 (N.D. Cal. Nov. 16, 2012).

21 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co., Inc. v United States*, 370 U.S. 294, 320 (1962).

22 There is general agreement that innovation is more important to economic growth than price competition. See, e.g. Howard Shelanski, *Information, Innovation, and Competition Policy*, 161 U. Pa. L. Rev. 1663, 1674-75 (2013).

The consumer welfare standard, however, is not a legal impediment to the consideration of these nonprice factors, as *Microsoft*[23] demonstrated. In *Microsoft*, the U.S. Court of Appeals affirmed most of the government's monopolization claims against the company despite the absence of evidence that Microsoft's conduct raised prices or reduced output for any product.[24] This outcome supports the argument that rejecting the consumer welfare standard is not necessary to reinvigorate antitrust law. Instead, making some targeted reforms in application could go a long way in spurring more robust enforcement. In a few areas where overly restrictive case precedents may stand as obstacles (e.g. the restrictive potential competition doctrine in the U.S.),[25] antitrust enforcers could seek a more expansive interpretation, or even an overruling, of the problematic relevant judicial precedents through the careful selection of test cases.

III. STRENGTHENING ANTITRUST ENFORCEMENT WITHIN THE CONSUMER WELFARE RUBRIC

Despite the broad scope of the consumer welfare standard, antitrust enforcement has in fact fallen short due to several factors, including the inability of antitrust enforcers to fully keep up with the new markets, the difficulty of applying nonprice metrics, burdensome evidentiary standards, and American courts' restrictive interpretation of a few important relevant antitrust doctrines. I believe that finding practical solutions to these problems should strengthen antitrust enforcement, within the consumer welfare rubric and without the need to jettison a paradigm that is conceptually sound and is embedded into competition policies of many countries including the U.S.

First, digital markets are fast-moving and complex, which requires enforcers to have expertise in order to truly understand them.[26] Having a deeper understanding of the technologies and the workings of these markets would allow enforcers to recognize more novel sources of market power, observe and analyze less visible nonprice competitive harms, understand the full impact of data on competition, evaluate efficiency claims, and understand what might or might not work to foster competition in a particular digital market.

Second, challenges to mergers or to dominant firm conduct absent price effects are infrequently brought because of difficulties of proof and other problems. Because digital platforms generally do not compete on price, a greater willingness on the part of antitrust enforcers to investigate nonprice harms and assert loss of innovation and potential competition as theories of harm is key to more vigorous enforcement. While cases based on these harms are difficult to investigate and pursue, *Microsoft* demonstrates that success is possible; courts have been willing to find consumer harm, based on harm to the competitive process,[27] in the absence of any evidence that a monopolist's conduct led to higher prices or reduced output.

Third, reducing the evidentiary standards currently imposed on plaintiffs and adjusting presumptions and burden-shifting frameworks in a more pro-enforcement direction are moves that can be especially helpful for enforcement in digital markets where the alleged harm, being nonprice, is inherently difficult to prove. These types of reforms are not inconsistent with the consumer welfare standard flexibly applied, but may require persuasion of the federal judiciary.

Fourth, the doctrine of potential entry is hardly a bar to mergers today because of the Supreme Court's extremely narrow interpretation of that doctrine over four decades ago.[28] By analogy, it is probably equally difficult to rely on loss of potential competition as a theory of harm in a conduct case. Yet loss of potential competition is a genuine risk in digital markets and warrants continued agency attention. Much has changed in the economy in the forty to fifty years since the Supreme Court articulated the potential entry doctrine, and the time may be ripe to seek judicial reexamination of the doctrine when a good case presents itself. In short, the key to addressing the competitive challenges in today's digital markets is not to change the consumer welfare paradigm but to make intelligent changes within it.

23 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

24 The government had charged that, to protect its Windows monopoly, Microsoft engaged in a variety of exclusionary practices to squash a competing browser and another potential nascent technology before they could potentially succeed in developing the features that could threaten Microsoft's Windows monopoly. But there was no evidence that Microsoft's bad conduct raised prices either for Windows or for browsers (which were free to consumers).

25 See, e.g. *United States v. Marine Bancorporation*, 418 U.S. 602, 624-25 (1974) (on who is considered a "perceived potential entrant"); *United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980) (on who is considered an "actual potential entrant").

26 In the U.S., antitrust agencies have started taking steps in that direction, with the Federal Trade Commission having recently set up a Technology Task Force.

27 *U.S. v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) (stating that a prima facie case requires proof of "anticompetitive effects," but anticompetitive effects can be evidenced by conduct that "harm[s] the competitive process and thereby harm[s] consumers.").

28 *United States v. Marine Bancorporation*, 418 U.S. 602, 624-25 (1974) (stating the standard for "perceived potential entrant"); *United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980) (stating the standard for the "actual potential entrant" theory, which incidentally has never been endorsed by the Supreme Court).

IV. SOCIAL AND POLITICAL HARMS UNRELATED OR ONLY TANGENTIALLY RELATED TO COMPETITION

Of course, these changes would not address populist critiques that fault the consumer welfare standard for its failure to reach a panoply of social or political ills, such as economic and political inequality and threats to democracy.[29] The digital platform giants are also widely criticized for intrusion on consumer privacy, lack of transparency relating to data use, influence on the news and digital advertisements that we consume, negligence in managing data security, sloppiness in policing "fake news" and hateful messages, and more.

Critics are correct that antitrust law does not deal with these problems. But no law, including antitrust law, should be burdened with performing tasks for which they are ill-suited. Nor should any law be manipulated to make it function in ways for which they were not designed. Bringing antitrust to bear on corporate mismanagement or on the miscellaneous undesirable consequences of the platform's services, when they are unrelated to competition issues, would completely transform antitrust law and the role of enforcement agencies.

I believe that tackling non-competition related problems directly, using existing or new laws and policies targeted to the specific problems, should deliver better results and with less risk of unintended consequences. Consumer protection laws and specific privacy and data security regulations would be a better fix for transparency and privacy issues than antitrust law. Similarly, tax and labor laws, job-training and education initiatives, rather than antitrust, would be more effective in dealing with economic inequality or loss of jobs due to technological advances.

V. THE RISKS OF A FUNDAMENTAL SHIFT FROM CONSUMER WELFARE

From the perspective of populists, another limitation of the consumer welfare standard is its neutrality on size. The standard, being economically grounded, does not act against size or market power standing on its own. Antitrust law does not prohibit a company's gaining or retaining market power due to economies of scale and scope or network effects, recognizing that size and concentration based on scale and scope can be efficient and deliver substantial consumer benefits. It also does not prevent organic growth by a successful company for similar reasons.

Populists tend to reject this economic grounding of antitrust and advocate a fundamental shift away from the consumer welfare paradigm, in order to permit more radical solutions such as "no-fault" breakups of the largest digital companies.[30] I do not share that perspective and believe that safeguarding competition, not combatting size, should remain the heart of competition law because, all else being equal, competition benefits consumers and the economy, and fosters innovation and growth. Abandoning consumer welfare in order to more easily "take down" the largest digital platforms risks throwing out much of what is good about the platforms along with the bad. It could also do unnecessary or disproportionate damage to a very creative and successful industry. Antitrust enforcers do have the tools to engage in more aggressive antitrust enforcement, while adhering to the consumer welfare principle, by apply existing law to a fuller extent and implementing some intelligent changes.

Some have suggested that replacing the consumer welfare standard would be useful, even if it is broader in scope than is popularly thought, because its misleading label causes confusion. Were we operating on a clean slate, I would probably agree; "consumer welfare" is an odd term to use for a standard that reaches beyond what is normally considered consumer welfare. But we are not operating on a clean slate — the paradigm has been incorporated into competition policies throughout the world, and the term infuses American antitrust decisions. While interpretation of the term differs to some extent among different jurisdictions and among scholars, there is general agreement on its basic meaning and purpose — to safeguard the competitive process so as to ultimately benefit consumers. Given that, there is no compelling reason to incur the disruption and uncertainties that would surely accompany such a change.

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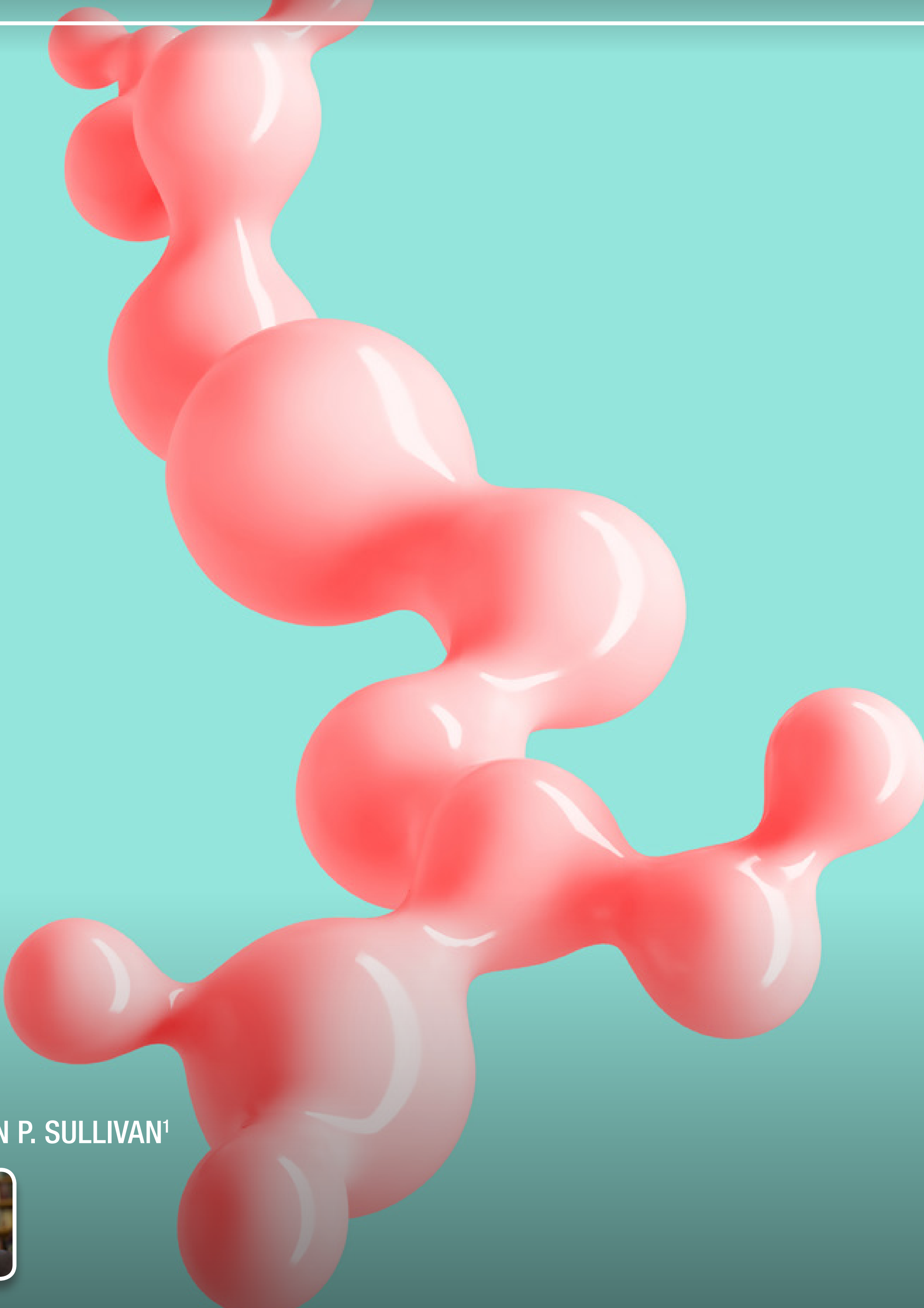
29 See, e.g. Wu, *supra* note 3; Khan & Vaheesan, *supra* note 3.

30 See, e.g. Elizabeth Warren, *Here's How We Can Break Up Big Tech* (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c (proposing to break up Amazon, Google, Facebook, and Apple — technology firms that have annual global revenue of $25 billion or more, and also operate a platform or a digital marketplace).

VI. CONCLUSION

Among those who agree that the antitrust laws are underenforced, there is nonetheless a chasm. There are those who see the consumer welfare standard as so defective that it should be abandoned. While I share their concerns about the market power problem, particularly in the digital platform markets, I do not believe that a complete shift in paradigm is necessary or wise. If used to its full scope, and with some intelligent changes within the system, the standard can address most of the competition-related economic problems that have been identified. If it becomes clear that competition truly cannot solve a few endemic problems in the digital platform markets, limited legislation or regulation could be called for, as a supplement to antitrust. Consumer welfare, indeed, does not directly address various social and political harms unrelated to competition, but these harms are better dealt with directly by laws designed for those specific purposes.

ANTITRUST AMORPHISMS



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I. INTRODUCTION

I suspect that every antitrust attorney and economist has at some point participated in a version of the following conversation.

Lay person: "So what area of law do you work in?"

Me: "Mainly antitrust."

Lay person: "Oh okay. So, like, breaking up big tech companies?"

Me: "Well, not exactly. Antitrust isn't directly concerned with the size of a firm. It isn't illegal to be big."

Lay person: "I thought it was illegal to have a monopoly."

Me: "It can be illegal to monopolize, but it isn't illegal to be a monopolist."

Lay person: "What's the difference?"

Me: "Well, monopolize is a verb and . . ."

Lay person: "You know what? I don't care. Just tell me this. What does antitrust law actually prevent?"

To be honest, I don't answer that last question. I dodge it. And I suspect that most antitrust specialists do the same. Oh, I give an answer. I say something like antitrust is about preventing "harm to competition" or that it is about protecting "consumer welfare." These are talismanic words in antitrust. But in reality, they don't convey much meaning. Just looking at the range of conduct to which each label has been applied and withheld over the years, it becomes clear that neither statement is even close to a literal description of antitrust policy.

The fuzziness of these foundational concerns is disquieting, but not necessarily bad in itself. Jonathan Baker has described the unresolved tension between total welfare and consumer welfare norms of antitrust policy as part of the political compromise upon which modern antitrust rests.[2] Something similar may apply to things like the consumer welfare label. Depending on the context, "consumer welfare" has been used to mean total welfare, to mean allocative efficiency, to mean what Steve Salop has termed "true consumer welfare,"[3] to mean certain types of concerns about wealth redistribution, and to mean other things as well. This flexibility undoubtedly has forestalled some irresolvable debates and probably has facilitated cogent reasoning in at least as many cases as clearer but more rigid terminology would have allowed.

But there remains a dark side to antitrust's heavy reliance on amorphous phrases like "harm to competition" and "consumer welfare." These antitrust amorphisms make it damn near impossible to explain antitrust policy to lay people in finite time. That would be regrettable under the best of circumstances. In times of antitrust populism — now, for example — it obstructs and delays important conversations, and risks confused policy-making at a time when we can least afford it.

To be concrete, consider some of the recent critiques of antitrust, and the corresponding proposals for antitrust reform. One critique of antitrust is that it is responsible for the perverse U.S. income distribution; antitrust policy is argued to be an appropriate tool for addressing and correcting income inequality.[4] Another critique is that lax and ineffective antitrust enforcement has allowed market concentration to explode across the economy.[5] The growth of wealthy companies in concentrated markets is a topic of special concern. Large companies are seen to have too much economic and political influence. To combat this, some politicians propose to break up large companies,[6] deconcentrating markets and reducing undue political influence in the process.

2 Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 Fordham L. Rev. 2175, 2180-92 (2013).

3 Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 336 (2010).

4 E.g. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 Harv. L. & Pol'y Rev. 235 (2017).

5 E.g. Lance Lambert, *Here's How They Play Monopoly in America, and Who Wins*, Bloomberg Business, April 5, 2017, https://www.bloomberg.com/news/articles/2017-04-05/here-s-how-they-play-monopoly-in-america-and-who-wins ("Market concentration in the U.S. has reached a three-decade high, while the government has opened fewer antitrust cases.").

6 E.g. Elizabeth Warren, *Here's How We Can Break Up Big Tech*, Medium Business, March 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

There is room to debate the accuracy of these critiques and the wisdom of the corresponding proposals. But nobody can seriously deny that these ideas deserve reasoned responses. Indeed, many of these very sentiments are what motivated the adoption of the antitrust statutes in the first place. Speaking during Congressional debate of the Sherman Act, for example, Senator Sherman relayed the following concerns and implicit proposals:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that 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. These combinations already defy or control powerful transportation corporations and reach State authorities. … Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every product and a master to fix the price for every necessity of life.[7]

Over more than a century of experimentation, antitrust law has considered and rejected most of the current populist proposals in favor of its modern focus on harm to competition and the consumer welfare standard. But was it right to do so? That is an important question. It deserves a serious answer. The conversation stalls, however, when we discover that the answer depends in part on which definition of the "consumer welfare" standard we are using; depends on which version of "harm to competition" we mean. How can we have an intelligent conversation about the pros and cons of current antitrust policy when that policy defies concise and coherent summary at every turn?

The brevity of this essay should dispel any hope that answers to these difficult questions are forthcoming here. Rather, the following pages detail the perhaps surprising difficulty of pinning down the content of our foundational antitrust objectives — preventing harm to competition and harm to consumer welfare. Viewed in the most constructive light, this essay outlines the complexities that advocates of traditional antitrust will need to face in seeking a meaningful dialogue about the merits of proposed antitrust reforms and critiques of existing standards.

II. HARM TO COMPETITION

Suppose you are being held hostage by a niche-movie serial killer and the only way to save your life is to get a room full of antitrust practitioners to agree on something. First of all, it's been nice knowing you. Second, your best bet is probably to propose some version of the following claim: antitrust law is about preventing harm to competition. The spirit of that statement is captured in *Brown Shoe*'s famous admonition: "It is competition, not competitors, which [antitrust] protects."[8] (We can politely agree to ignore the next few sentences of the opinion.[9])

Selective memory aside, the general acceptance of this proposition belies a difficult question: what does harm to competition actually entail? Anthropomorphizing competition as something that can be harmed is a bad start. People can be injured; all that competition can be is modulated. And nothing about the modulation of trade or competitive interaction is good or bad in the abstract. Assigning the label of "harm" or "injury" to a given modulation thus requires some basis upon which we are separating the desirable modulation from the undesirable.

Early antitrust cases struggled with this problem. After a brief experiment in treating every restraint of trade as an illegal injury to competition,[10] the Supreme Court retreated to a flexible position in *Chicago Board of Trade*:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. ... The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[11]

Of course, this merely rephrases the problem. The question now becomes what distinguishes a restraint that regulates or promotes competition from one that suppresses or even destroys it? Unhelpful and conclusory glosses in other early cases included the blessing of restraints that merely secure "fair opportunity" to compete when "engendered by an honest desire for gain,"[12] or that serve "lawful" and "legitimate"

7 21 Cong. Rec. 2460 (1890).

8 *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

9 *Id.* ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.").

10 E.g. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

11 *Board of Trade of The City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

12 *F.T.C. v. Sinclair Ref. Co.*, 261 U.S. 463, 476 (1923).

business ends,[13] as opposed to those abhorrent acts that "unduly restrict competition."[14] Throughout many of the early cases, there also lurked a still-persistent tendency to seek to define harm to competition on the dubious basis of the subjective mental states of the responsible actors.

The ambiguity of these early efforts to define harm to competition reflects the difficulty of the task. For all the ink that has been spilled over the legislative intent behind the antitrust laws, the truth remains that Congress never purported to draw a clear line between legal contracts and illegal harm to competition. In the same speech quoted above, Senator Sherman admitted to this punt:

> [I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them as to carry out the meaning of the law.... This bill is only an honest effort to declare a rule of action.[15]

Perhaps it was wise of Congress to leave to the courts the task of saying, in effect, what harm to competition entails. By most accounts, years of judicial efforts to build this framework have been a success. U.S. antitrust law is among our county's most popular exports. But years of judicial efforts have not distilled a legal standard that is easy to communicate to anyone not already steeped in the field.

To a lay person, apparent contradictions and equivocations abound. For example, is it "harm to competition" if a firm so underprices its rivals that it drives them out of business? Sometimes, but not always.[16] What about outright acquisition of rivals: is it harm to competition if a firm acquires a direct rival, suffocating all competition between the two firms? Sometimes, but not always.[17] Is it harm to competition to enter an agreement with competitors that affects price? Sometimes but not always.[18] Is it harm to competition to agree not to compete at all along some dimension of trade? Sometimes, but not always.[19]

The point is not that competitive nuances should be ignored; nor that these equivocations about the meaning of "harm to competition" are wrong or misguided. The point is simply that the actual content of antitrust's goal of preventing "harm to competition" turns out to be quite technical and complicated when you sit down to try to explain it. Indeed, "competition" is not even the thing that antitrust law protects. It is primarily harm to something called "interbrand competition" that draws antitrust's attention.[20] And this is to say nothing of further nuances relating to the mode of competition: price vs non-price competition, static vs dynamic competition, competition in brand positioning, in quality, in innovation, and so on.

Antitrust insiders do not feel these complexities acutely in our day to day affairs. The field has largely sidestepped the problem by adopting the shorthand terminology of consumer harm — and the consumer welfare standard — as the core content of what harm to competition entails. This focus on consumer welfare is helpful and clarifying. Unfortunately, it too masks more knotty technicalities and equivocations than one might expect.

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13 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) ("[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract.").

14 *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911).

15 21 Cong. Rec. 2460 (1890).

16 E.g. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–27 (1993) (sharply restricting the conditions under which exclusionary pricing is illegal).

17 E.g. *Int'l Shoe Co. v. Fed. Trade Comm'n.*, 280 U.S. 291, 297–98 (1930) ("Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden.").

18 E.g. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("Not all arrangements among actual or potential competitors that have an impact on price are … unreasonable restraints.").

19 E.g. *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 771 (1999) ("[I]t seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect … on competition….").

20 E.g. *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

III. HARM TO CONSUMERS

To be clear, the consumer welfare focus is one of modern antitrust's greatest strengths. Like most antitrust insiders, I constantly rely on consumer welfare arguments when trying to explain and analyze antitrust cases. With that said, I think we all must admit that a good part of the clarifying power of the consumer welfare standard actually comes from the false sense of simplicity that it gives to modern antitrust practice.

Consumer welfare is in many ways a head fake. It is not always, and/or not exactly, about consumers. It also contains policy ambiguities that remain unanswered to this day. In every respect, consumer welfare is a far more technical and complicated concept than meets the eye.

Part of the head fake is a well-known secret. While outsiders and early students of antitrust law often perceive antitrust to be focused solely on preventing harm to consumers, insiders know that it isn't so simple. This is not to diminish the excellent basis for confusion. Ever since the Supreme Court decided *Reiter v. Sonotone*, there has been an easy cite for the proposition that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[21] To all the world, this would seem an unambiguous statement of antitrust's motivating principle.

But this is antitrust, and nothing in antitrust is simple. The sole authority that *Reiter* relies upon for the phrase "consumer welfare prescription" is Robert Bork's *Antitrust Paradox*. And Bork famously used the language of "consumer welfare" to label a concept closer in spirit to what economists would call "total welfare," an objective no more focused on consumers than on any other interest in the economy.[22] With no clear answer on how to interpret this passage in *Reiter*,[23] internal debates about whether antitrust should focus on consumer welfare or total welfare continue to this day.

Surprisingly, however, these debates have not marshaled any serious efforts to revisit or undermine the "consumer welfare prescription" which Congress apparently laid out. Instead, today's antitrust paradox is that while everyone ostensibly agrees that antitrust is about consumer welfare, the same term — "consumer welfare" — is tacitly allowed to mean different things to different people at different times. Again, nothing in antitrust is simple.

Sometimes "consumer welfare" does indeed mean what it sounds like: a primary interest in preventing things like higher prices for consumers. An example of this understanding of consumer welfare is the efficiency pass-through requirement in the 2010 Horizontal Merger Guidelines, which predicates the availability of a merger efficiency defense on the condition that consumers not pay higher prices as the result of a merger.[24] Similar reasoning is evident in the Supreme Court's analysis in *Brooke Group*, where a reasonable prospect of recoupment is required before below-cost pricing can be found illegal because "unsuccessful predation is in general a boon to consumers."[25]

Other times, the terminology of "consumer welfare" is used where the real concern is not consumers at all, but allocative efficiency and total welfare. The hallmark of this use of consumer welfare language is the actual identification of anticompetitive conduct with reduced output.[26] A recent example is the opinion in *Ohio v. American Express*, in which the Supreme Court majority stated that "[harm] to consumers in the relevant market" was the basic test of illegality,[27] but then quietly defined "anticompetitive prices" to include only those prices raised "profitably *by restricting output*."[28] Harm to consumers, in this approach, is not what the consumer welfare standard is about. Consumer harm is merely a corollary and convenient proxy for the real focus on conduct that restricts output and thus reduces allocative efficiency and total welfare.[29]

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21 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342–43 (1979).

22 Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 66, 97–101 (1978).

23 Salop, *supra* note 3, at 347 ("[I]t is unclear if the Court even understood that Judge Bork was effectively re-defining the term 'consumer welfare' to mean something very different.").

24 U.S. Dep't of Justice & Fed. Trade Comm'n, 2010 Horizontal Merger Guidelines § 10 ¶ 6 ("The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.").

25 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); see also *id.* (noting that, without recoupment, "consumer welfare is enhanced").

26 E.g. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (defining "conduct that is manifestly anticompetitive" as conduct "that would always or almost always tend to restrict competition and decrease output.").

27 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

28 *Id.* at 2288 (emphasis in original) (citing Philip Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 5.01 (4th ed. 2017)).

29 See Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 Fordham L. Rev. 2471, 2477 (2013) ("[A]ntitrust policy in the United States follows a consumer welfare approach in that it condemns restraints that actually result in monopoly output reductions …."); *id.* at 2474 ("[T]he economic analysis from the dominant Harvard and Chicago schools of antitrust is consistently concerned with [total] welfare….").

This ambiguity in the meaning of the consumer welfare standard is known and increasingly accepted. Recent scholarship shrugs it off as benign if not desirable. Perhaps it is. But it adds yet another wrinkle to the already difficult task of explaining modern antitrust to a lay person. And the wrinkles don't stop there.

Beneath the surface of the consumer welfare label lurk unresolved policy decisions. There isn't space here to do them justice, but examples include the following. In monopsony and oligopsony theories, is it harm to the immediate consumer or the final consumer that matters? How is harm to consumers defined for practices — like many types of price discrimination — that benefit one group of consumers while harming another group? Must injury to competitors always result in harm to consumers to state an antitrust violation? (The answer should depend on how close to total welfare one defines the "consumer welfare standard.")[30] Does consumer harm result from an activity that reduces output but also results in higher quality goods or services? What if the activity lowers the price of some products, while simultaneously eliminating other products, thus restricting consumer choice?

These types of complexities and ambiguities are familiar to antitrust specialists. They have persisted for decades and, apart from complicating specific cases and investigations, they have not seriously derailed the enterprise. But ambiguities they remain. As such, they represent continuing obstacles to the communication of modern antitrust policy to lay people. In a world where all ideas must be reduced to soundbites, the meaning of antitrust's consumer welfare standard is hopelessly opaque.

IV. WHAT DOES ANTITRUST PREVENT?

I want to emphasize that I am not denigrating the goals of preventing harm to competition or protecting consumer welfare in this essay. Few evolutions in the law of antitrust have done more to improve, clarify, and rationalize this area of law than the adoption of these standards. But those very real benefits do not diminish the costs of these standards — the complexity and technicality that they import to antitrust practice. These are unyielding terms of art. And that it not innocuous.

Even if current antitrust law were the finest approach to competition policy ever invented, its ultimate sticking power would still rest on the persuasiveness of this claim to a generalist audience (citizens, voters, the affected population). Antitrust amorphisms like "harm to competition" and the protection of "consumer welfare" work fine within the highly technical and specialized confines of the antitrust bar, but flounder at the point where outsiders are exposed to antitrust policy. It takes concerted effort to give an honest answer to the simple question: "What does antitrust prevent?" At this point in the history of our field, that's a problem.

30 See Salop, *supra* note 3, at 343 (discussing this point); see also Richard A. Posner, Antitrust Law 13–15(2d ed. 2001) (discussing rent seeking inefficiencies when firms use certain activities to gain market power as a justification for antitrust law).

POWERLESS ANTITRUST

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I. INTRODUCTION

Over the last century and a half, our ability to challenge corporations has been disempowered in two senses: antitrust has lost the power to effectively regulate the power of companies and, relatedly, only a very narrow form of corporate power remains relevant to antitrust liability, with all other forms of economic and political power removed from the analysis. It can be no surprise then that companies are more powerful than ever and plenty of corporate conduct and misconduct slips through the regulatory cracks.

Antitrust has a rich and storied history, from Roman edicts protecting the price of grain to the rules preventing sellers from cornering literal village markets in Medieval England. But as we contemplate how to confront corporate power in the 21st Century, we would do well to consider the equally rich history of the regulation of the subject of our concerns: the corporation. In fact, these parallel histories are deeply intertwined and examining the connections sheds light on how we can regain control over powerful companies. We see, for example, that the recent announcements by groups of state attorneys general bringing cases against Facebook and Google are not a break with the tradition of federal regulation but rather a return to form.

Antitrust did not come into being, *de novo* and fully formed, with the passing of the U.S. Sherman Act in 1890. Not only is regulation of the market almost as old as markets themselves, but what we find from taking a broader view of the regulation of the corporation is that key elements have been removed from our analytical toolbox along the way. Power has all but disappeared from antitrust analysis and antitrust has been left, perhaps unsurprisingly, more or less impotent to contend with corporate power.

There is ample evidence that despite a growing international technocracy of competition law enforcement, consuming significant administrative resources and corporate and regulatory attention, antitrust is not doing its job. Many economies are characterized by rising industrial concentration, mounting price markups and ballooning corporate profits, with the related economic ills of increasing inequality, floundering productivity, stagnant wages and lackluster innovation. At the same time, the accumulating spillovers of free market competition — the risks to the climate balance of our ecosystems, the threat to our democracies, the unknown path of technology and its impact on human societies — indicate that there are many variants of corporate impact that are not adequately captured by the consumer welfare framework.

It is often assumed that these social and economic costs, bizarrely labelled as "non-economic" by a welfare-based regime that eagerly accounts for efficiencies but not externalities, are best dealt with through regulation — whether environmental law, labor law, tax codes or anti-corruption measures. But what we learn from the early models of antitrust and corporate regulation is that it was well-understood that corporate power left to proliferate would easily be able to evade or subvert such other regulation. Feeding the beast whilst placing faith in the strength of the cage was, it was thought, a rather naive approach. In fact, taking a look at the circumstances under which the Sherman Act was developed we can see that federal antitrust was largely designed to fill the gaps left by regulation, to contain the power that regulation could not reach. It was meant as a replacement for a more comprehensive model for regulating corporate power — found in early corporate law — even if the implementation failed to fully deliver this.

This article will describe the two phases of antitrust's disempowerment, whereby a central concern for *power* was first adjusted towards a focus on unreasonable corporate *conduct* and then ousted completely by an overriding interest in the *outcome* of efficiency.[2] I will make the case that antitrust should take the role of filling the gaps left by other regulation — catching precisely that residual corporate power that cannot be otherwise confronted. I will end by looking at how we might re-empower antitrust to meet the concerns with corporate power that have never really gone away.

Corporate Power Two Steps Removed

19th C		**Early 20th C**		**1950s onwards**
Corporate Law	➔	Restraint of Trade	➔	Consumer Welfare
Power		*Conduct*		*Outcome*

2 These phases included a significant amount of overlap and cannot be as neatly separated in time as I have presented for simplification. The active antitrust enforcement of the early 20th Century in the U.S. under the restraint of trade model, for example, often attempted to go beyond the consideration of conduct to address the power of firms themselves, with varying degrees of success.

II. POWER

An understanding of the historical regulation of corporate power, especially in the U.S., is critical to appreciating the limitations of the current paradigm. Before the 20th Century, the power of corporations was controlled through corporate law. Individual corporate charters contained various provisions that had as their intended effect the limitation and restriction of the size of industry and the extent of corporate power. At the core of this regime was an attempt to balance the potential for the corporation to act as an invaluable vessel for wealth-creation with the risk that it could end up overwhelming the power of the state.

Corporate law initially appeared to be a powerful weapon for trust-busting.[3] Corporate charters would generally limit which industries a company could operate in; place restrictions on cross-ownership of other commercial entities; or include minimum or maximum requirements in terms of capital deployment and reserves. A canal company charter might contain a detailed schedule of rates to be charged to users, and a bank charter would include a specified ceiling for interest rates. Other provisions, designed to protect investors, we would recognize from modern corporate governance: requirements to publish annual financial statements, rules on indebtedness and dividend payments, rules on electing directors giving minority shareholders disproportionate voting power.[4]

Incorporation was a privilege, which the state was empowered to take away. Chartering often came with a responsibility to complete some form of public works, and also — in the model of letters patent — with the inducement of a limited monopoly to allow recoupment of costs and to incentivize investment. But there was a serious mechanism of accountability: if the privilege was abused or responsibility abdicated the corporation would face dissolution.

Even once general incorporation was introduced, no longer requiring the procurement of a firm-specific corporate charter for most companies, the state could challenge a corporation for exceeding its generic license in a *quo warranto* proceeding — bringing the company before the court and interrogating "by what authority" the company had engaged in the acts under examination. Corporations were regularly dissolved for breach of their public charters, or held subject to an injunction to remedy the breach.

From the late 19th Century, as corporate power exploded, driven by the rise of capital-intensive industry and the growth of the national American market, the *quo warranto* procedure was increasingly used by state attorneys general as what Daniel Crane has called a "form of crude antitrust law."[5] The procedure was relied upon to resist the blossoming concentration of corporate might engulfing the country. What was at stake was individual freedom and agency. An economy of corporate monoliths threatened to circumscribe entrepreneurial opportunities for the individual and left the disenfranchised employee subject to the machinations of the all-powerful professional manager. Vast swaths of economic resources were subject not to public political democracy nor individual decentralized control but to the consolidated authority of the behemoth business concern.

Indeed, before it was later broken up under the Sherman Act, the Standard Oil Trust was first challenged in a *quo warranto* proceeding.[6] These cases went beyond the relatively more simple analysis of breach of corporate charter and thus, paving the way for modern antitrust, it was necessary for the state enforcers to prove harm to the public interest, although in the case of an established monopoly the public detriment was simply assumed.[7] It was not a slam dunk for enforcers though, because they also had to show that the law had been broken in some way, and companies became very creative in finding ways around the law. The Standard Oil Trust, for example, not to be so easily defeated by an order for dissolution for breach of its Ohio charter, merely reincorporated under the more permissive corporate laws of New Jersey.[8]

3 Herbert Hovenkamp, *Enterprise and American Law, 1836-1936* (1991), p. 247.

4 Eric Hilt, *Early American Corporations and the State*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), pp. 51-52.

5 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 112.

6 Hovenkamp, Herbert J., "The Classical Corporation in American Legal Thought," 76 Geo. L. J. 1593 (1988), p. 1671.

7 Hovenkamp, Herbert J., "The Classical Corporation in American Legal Thought," 76 Geo. L. J. 1593 (1988), p. 1670.

8 Hovenkamp, Herbert J., *The Classical Corporation in American Legal Thought*, 76 Geo. L. J. 1593 (1988), p. 1671.

III. CONDUCT

The next phase of regulation of corporate power is usually taken as the beginning of antitrust as we know it: the passage of the Sherman Act. The drafters of the Sherman Act drew on the existing common law of restraint of trade and monopolization, with a long lineage at English common law as well, which rendered void any contracts that would create a monopoly or otherwise inflict anticompetitive harm on the public. Critically, the common law restraint of trade paradigm was permissive of *reasonable* restraints.

There was an active debate at the time as to whether the Sherman Act merely codified the common law position or if it superseded the historical precedent and made *any* restriction of competition by private parties a criminal restraint of trade.[9] In 1897, the Supreme Court established the possibility of a broad ban against monopolies and restraints, holding in *Trans-Missouri Freight* that both reasonable and unreasonable restraints were illegal.[10] But then for the next 14 years the court went back and forth, flip-flopping its position, until it finally landed where it remains today. The 1911 *Standard Oil* decision, finally breaking up the company, also restored the common law position.[11] From then on, restraints would be subject to a rule of reason balancing analysis determining whether corporate action restricted competition or had an exclusionary effect.

What this meant in practice was that, as Daniel Crane describes, "the federal government has largely found itself in the position of regulating *conduct* by "corporate persons" rather than creating, structuring, and regulating *corporations themselves*."[12] Antitrust was from that moment hobbled by the need to prove economic harm — it would be assumed only in limited circumstances — and the power of the corporation itself was no longer the primary focus of the law.

Many thought that the choice by Congress to use the common law restraint of trade approach in the Sherman Act demonstrated a "certain lack of enthusiasm for the entire problem" — a federal incorporation statute for multi-state firms would have been a much stronger regulatory route to deal with the trusts.[13] It was widely considered at the time that *Standard Oil* effectively rendered the Sherman Act redundant and there were immediate calls for fresh legislation to restore the statute to its intended force.[14] Antitrust under the Sherman Act was a much weaker tool for constraining corporate power than corporate law once had been.

IV. OUTCOME

The concept of economic harm under the restraint of trade model was broad enough to capture many variations of corporate power but this was not to be antitrust's fate. From the 1950s to the 1970s the regime underwent a further transformation into its modern form, adopting the consumer welfare model that dominates the discipline today. Instead of viewing corporate power as a fundamental threat to the power of the polity, this transformed antitrust instead treats corporate power as either ephemeral or deserved: either the monopolist warrants their dominance, or it will soon be competed out from under them. Since so few dominant firms are in fact dethroned, their power must, by this logic, be justified.

Although corporate conduct is still relevant to the analysis under the consumer welfare test — it is conduct, after all, that creates anticompetitive harms — the primary focus has shifted to the ultimate *outcome* on the market, in terms of efficiency. This has brought with it an analytical neutrality as to process: efficiency, however achieved, even if by a firm with market power, becomes the goal of antitrust practice.

Others have written extensively on the influence of certain conservative thinkers, particularly Robert Bork, on this evolution of antitrust. Bork catalyzed this fundamental shift in our understanding of corporate power by couching neoclassical economic theory in hardline legal terms that would treat corporate power as benign, often giving disproportionate weight to potential mitigating efficiencies.[15] The process of competition, under the Borkian model, is regarded as valuable only if it produces efficiency and, on the flipside, if efficiency can be achieved without the *inefficiency* of competition then so much the better.

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9 Sklar, M., *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (1988), pp. 127-128.

10 *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

11 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

12 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 110.

13 Herbert Hovenkamp, *Enterprise and American Law, 1836-1936* (1991), p. 247.

14 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux & Novak (eds.), *Corporations and American Democracy* (2017), p. 123.

15 For a good discussion of Bork's influence in this regard see Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. F. 960 (2018).

To assess the extent to which this vision has come to capture how antitrust proceeds against the accumulation of corporate power today, we need only consider the much-cited passage from Justice Scalia's opinion in *Verizon v. Trinko*: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — at least for a short period — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth."[16] As Lina Khan writes, this view treats monopoly power as "not just unthreatening but also beneficial" with the "suspicion of concentrated power" replaced with a "reverence for it."[17]

This in fact was Bork's ultimate coup: by importing the neoclassical assumptions of the efficient corporation into the already weakened framework of restraint of trade, Bork was able to turn the concern for corporate power on its head. Instead of the corporate law model of incorporation as a privilege, with the default position being that corporations, as creatures of the state, must be supervised and constrained, the regulation of companies shifted to a default position that corporations, as creatures of the free market, should be left unconstrained, unless efficiency is compromised.

What we are left with is a gaping hole in corporate regulation — what Sanjukta Paul calls the "firm exemption" — which completely reverses the purpose of the law away from tackling corporate power and instead creates a space of amnesty for large, hierarchical firms.[18] The acceptance of efficiencies as a defense opens the door for firms to argue that vertical integration efficiently reduces the transaction costs of contracting for supply or distribution on the market and that horizontal combination efficiently reduces the costs of competition and the redundancy of duplicated efforts. Of course, by this logic, the smaller rival or a cooperative of producers will almost definitionally be less efficient. The analysis is thus rigged in favor of impunity for big firms, regardless of their power.

Embedded within modern antitrust law, then, is a fundamental concern not for corporate power but for the potential that antitrust enforcement might compromise the natural efficiency of business with Type I, false positive errors. The typical Type I-phobic commentator thus approaches the question of the appropriate limits on business looking down from the other end of the telescope, asking, as Geoffrey Manne does: "Should we give antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation [enforcers, not monopolies] in careful, economically grounded ways, aimed squarely at optimizing — not minimizing — the amount of antitrust enforcement?"[19] Not how should we restrict companies, but how should we restrict those who might want to sue them.

V. ANTITRUST FILLS THE GAP

Under a disempowered antitrust it has become evident that if monopoly is permitted by the law, encouraged even, and if dominance comes with no further responsibility, no direct and enforceable accountability to the state, to balance the privilege of corporate power, then the well-capitalized, market-ruling firm is able to fall out of the scope of government regulation and pass out of reach of the public completely.

The stated aims of the Sherman Act went well beyond consumer welfare in terms of increased prices: there was a concern with preventing unjust wealth transfers, protecting social values, promoting equality of opportunity, precluding coercion, and, importantly, curbing the ability of industry "trusts" to leverage their economic power into political power that could compromise the government — with the last certainly being a precipitating factor to the passing of the Act.[20]

The rise of the conglomerate, multi-state "trust" vehicle towards the end of the 19th Century, designed to evade the restrictions of state corporate law, posed a challenge for the corporate law model of regulating corporations just at the time that corporate law was facing its own disempowerment: following examples like the Standard Oil *quo warranto* case, the trusts lobbied for and obtained the watering down of state incorporation laws, triggering a "race to the bottom" as states like New Jersey and Delaware competed to attract corporations into their jurisdictions in order to gain access to registration fees and tax revenues.[21]

16 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

17 Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. F. 960 (2018), pp. 969-970.

18 Paul, Sanjukta, Antitrust As Allocator of Coordination Rights (February 19, 2019). UCLA Law Review, Vol. 67, No. 2, 2020. Available at https://ssrn.com/abstract=3337861.

19 Geoffrey A. Manne, *A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the U.S. and EU*, Statement Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 19 December 2018, available at https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf.

20 John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent and the Legislative History of the Sherman Act*, 33 Antitrust Bull. 259 (1988) p. 281.

21 Hovenkamp, Herbert J., *The Classical Corporation in American Legal Thought*, 76 Geo. L. J. 1593 (1988), p. 1669.

This dilution of the power of state attorneys general to directly challenge corporations left a gap in the regulation of corporate power, into which antitrust law was designed to step. The result was the piecemeal regulation of corporations through tax law, labor law, securities regulation and antitrust, split between a multitude of administrative agencies. This model of regulation was "fragmented by administrative topic and institution rather than being comprehensive and seamless" as it could have been if the federal government had been given the authority to prosecute power *per se*.[22]

Given that the regulatory lacuna lay in the weakening of corporate law, it is natural that one of the chief alternatives to regulating corporate power through antitrust and the Sherman Act was actually regulation through a federal incorporation law, reviving the model that had been so diluted by the race to the bottom at the state level. The prospect was seriously debated in the decades before and immediately after the passage of the Sherman Act, when the Act's shortcomings as a tool for controlling corporate power became overtly apparent.[23]

Even the founders of the neoliberal Chicago School, notorious for its hostility towards antitrust, expressed favor for federal corporate regulation. Henry Simons at one point suggested that all corporations should have the amount of property they own limited.[24] Aaron Director, one of Bork's mentors, similarly called for an end to the "unlimited power of corporations," not through antitrust but through corporate law, by limiting the size of corporations, circumscribing the scope of corporate activities, and more.[25]

It may seem strange that Chicagoans were willing to go further than the Sherman Act to limit corporate activities but it was actually the opposite. Using corporate law as antitrust is like flicking an on and off switch – either the company complies with the restrictions of its corporate charter or it will be dissolved. By contrast, the granular assessment of economic harm and price effects required by modern antitrust could be seen as actually requiring *more* meddling in markets, arbitrary assessments of anticompetitive conduct and more regulatory discretion.

Eventually, however, the broader Chicago agenda of promoting a passive faith in big business came to override any concerns with corporate power, and the possible need for a federal corporate regulator to challenge companies at an existential level similarly faded into the background.

That the matrix of tax, securities, labor and antitrust laws were meant to serve as equivalent to a federal incorporation law, which had the theoretical power to snuff out corporate power through dissolution, suggests that the role of antitrust in this matrix was meant to sweep up any residual political and economic power not adequately captured by the other regulatory arms. Other regulations would deal with subject-specific corporate transgressions but no other law, aside from antitrust, has roots in challenging corporate power itself and no other law was motivated by a desire to curb such power. If antitrust had any role it was to capture the encroachment by private actors on public freedoms in general.

There are other indicators too that federal incorporation and antitrust enforcement under the Sherman Act were seen as alternatives. Concerns with corporate power were specifically cited as the animating driver behind the proposals for federal corporate laws in the early 20th Century — at least for those proposals emanating from the anti-corporate lobby, which was also calling for stronger antitrust enforcement.[26] They ended up getting the latter, or at least the promise of the latter, with the establishment of the Federal Trade Commission in 1914, creating an agency nominally charged with broad powers to investigate companies at a federal level, and the passing on the Clayton Act which included provisions dealing with concerns like interlocking directorates which had been the target of some federal chartering proposals.[27]

22 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 110.

23 Daniel Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in Lamoreaux and Novak (eds.), *Corporations and American Democracy* (2017), p. 116.

24 Van Horn R. 2010, "Chicago's Shifting Attitude toward Concentrations of Business Power (1934-1962)," Seattle University Law Review, volume 34, pp.1532.

25 Rob Van Horn, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*, in Philip Mirowski and Dieter Plehwe (eds.), *The Road From Mont Pelerin: The Making of the Neoliberal Thought Collective* (2015), p. 212.

26 Hutchison, Camden, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, Columbia Business Law Review 1017 (2017), pp. 1032, 1035. Available at https://ssrn.com/abstract=2944637.

27 Lipton, Ann, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure,* Yale Journal on Regulation, Forthcoming (August 10, 2019), p. 45. Available at https://ssrn.com/abstract=3435578 or http://dx.doi.org/10.2139/ssrn.3435578.

VI. EMPOWERING ANTITRUST

Short of reviving the original model of antitrust through corporate law, we can at least go back to the second phase of antitrust, looking at restraint of trade in terms of reasonable conduct, but this time taking seriously antitrust's gap-filling role by importing those "non-economic," "public interest" concerns into antitrust analysis.[28] This would reverse the narrowing of antitrust inquiry, achieved by Bork and others, by recognizing externalities and other forms of corporate power within the restraint of trade framework.

But although Bork and his acolytes played an instrumental role in what Lina Khan calls the "enfeeblement" of antitrust, as we have seen, this was only the second phase of disempowerment which in fact began, ironically enough, with the enactment of the Sherman Act.

There may, however, be some fresh enthusiasm for federal chartering and mandatory corporate responsibility — potentially reverting back to the first phase of corporate regulation. Although not branded as an exercise in antitrust, the call for federal regulation of companies has been renewed by Senator Warren through her draft Accountable Capitalism Act, which would require companies with over $1 billion in revenues to obtain a federal charter and thus subject themselves to considerable public responsibility, regulatory oversight, and stakeholder governance, by the mere fact of their size.

One of the arguments against federal chartering in the 19th Century was that it would revive the old colonial system of those in power parceling out special privileges on a nepotistic basis. General incorporation was meant to make the corporate form available to the masses, although the natural agglomeration of capital that accompanied the second industrial revolution of the 1860s meant that corporate privilege increasingly came with size regardless of the source of the corporate charter. The distinction that must be made is that the monopolies that were handed out before general incorporation generally attached to the completion of public projects that were otherwise undesirable in their scope for risk and unprofitability. By contrast, the sorts of companies targeted by Senator Warren's Bill are engaged in highly profitable businesses, thus placing government in the position of gatekeeper to the untold market opportunities that would lie beyond the bar of federal regulation.

The Accountable Capitalism Act takes as its trigger corporate size, but in fact we might update the federal incorporation model, moving from a "crude" to a more nuanced form of antitrust, by tying responsibility to corporate power more directly. At the legendary Chicago Trusts Conference of 1899, one-time Presidential candidate William Jennings Bryan set out one proposal for federal chartering that would have prevented a chartered company from holding a monopoly in any line of business.[29] Actually we should do the opposite and regulate more heavily, and impose more public responsibility on companies in possession of significant corporate power, in recognition that, even with much-reinvigorated antitrust enforcement, there will always be some powerful companies.

It is less important whether this regulation happens at a federal or state level rather that it happens in earnest. National regulation of corporations in other jurisdictions, such as through the "enlightened shareholder value" principle embedded within the UK Companies Act, has been no more successful in creating corporate responsibility, in the absence of enforceable responsibilities and any authority empowered to enforce them. By contrast, in the antitrust sphere, monopolies in Europe are already subject to a "special responsibility" not to distort competition and various reform proposals contemplate categories of "strategic market status" or expanding the notion of "super dominance" for companies with systemic importance.[30] This could be a bridge to a form of chartering for such companies.

A newly-formed corporations regulator could be made responsible for regulating companies according to their chartered responsibilities while antitrust is used to identify which corporations are most in need of regulation on the basis of an assessment of power. Again, the public's "non-economic" concerns would be relevant — presence of externalities and evidence of the sabotage of economic democracy could be used as indicators of power. And these corporate charters might be quite different from those of old, reflecting modern realities of dispersed shareholding and globalization as well as concerns for society and the environment.

To avoid embedding monopolies into the infrastructure of national government, more radical proposals for limiting firm size absolutely, as once accompanied federal chartering proposals in the past, should be considered — Elizabeth Warren's $1 billion threshold triggering respon-

28 See for example Lianos, Ioannis, Polycentric Competition Law (September 1, 2018). Current Legal Problems (2018). Available at https://ssrn.com/abstract=3257296; and Simon Holmes, *Climate Change is an Existential Threat: Competition Law Must be Part of the Solution and Not Part of the Problem* (2019), available at https://www.law.ox.ac.uk/sites/files/oxlaw/simon_holmes.pdf.

29 Hutchison, Camden, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, Columbia Business Law Review 1017 (2017), p. 1037. Available at https://ssrn.com/abstract=2944637.

30 See for example, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (known commonly as the "Furman Review") (2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

sibility could be capped with a maximum limit on firm size. Zephyr Teachout, for example, has proposed that firms should lose limited liability beyond a firm value of $10 billion.[31]

As Herbert Hovenkamp has explained, the corporate law model had its defects, in particular the binary nature of much of the enforcement which avoids the bias towards efficiencies by leaving no room at all for their consideration.[32] Going beyond the welfare model, which still takes as a given the right for the company to exist, assuming that the overall effect is beneficial, we could instead incorporate elements of the corporate law model into antitrust, making the "right" of companies to incorporate conditional on serving the public interest once they have achieved some level of power.

The current debate over the consumer welfare standard has focused on that framework's preoccupation with price. But even the most radical of reformers suggests only regulating powerful companies or breaking them up, or sometimes both. Dissolution is not on the table, although the state attorneys general retain the authority to bring a *quo warranto* procedure.[33]

Regulation of the corporate form has always, at its heart, been about containing the power of the corporation vis-a-vis the state. The states that eventually controlled corporations through corporate law had themselves been subject to *quo warranto* proceedings: early U.S. states were formed as regional corporations with charters granted in England by the King.[34] The state government of Massachusetts, for example, was governed according to its corporate charter, and the charter acted as a protection against sovereign intervention — as long as they stuck to the powers granted by the charter, they were unlikely to attract the wrath of the colonial power for straying *ultra vires*. These corporate charters eventually became the model for the individual state constitutions. The governmental power to grant the privilege of private power is fundamental to the authority of the state, with the *quid pro quo* of state regulation of the corporate entity. Unless we take notice of power within antitrust, and account for the varied ways that the empowered corporation can shape markets and compromise society, that power will suffuse the system and there will be no stopping it.

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31 Teachout, Zephyr, Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform (January 23, 2014). Fordham Law Legal Studies Research Paper No. 2384182. Available at https://ssrn.com/abstract=2384182 or http://dx.doi.org/10.2139/ssrn.2384182.

32 Herbert Hovenkamp, Enterprise and American Law, 1836-1936 (1991), p 247.

33 See for example in Delaware: 8 DE Code § 284 (2016), available at https://law.justia.com/codes/delaware/2016/title-8/chapter-1/subchapter-x/section-284.

34 Bowie, Nikolas, *Why the Constitution Was Written Down* (2019). 71 Stan. L. Rev. 1397. Available at https://ssrn.com/abstract=3248450.