

The Antitrust Consumer Welfare Paradox

Barak Y. Orbach*

Work in Progress (January 2010)

*Consumer welfare is the only articulated goal of antitrust law in the United States. It became the governing standard following the 1978 publication of Robert Bork’s **The Antitrust Paradox**. The consumer welfare standard is instrumental to the implementation and enforcement of antitrust laws. Courts appear to believe that they understand this standard, because they do not bother to analyze it. Scholars hold various views about the desirable interpretations of the standard, and they selectively use random judicial statements to substantiate opposite views.*

This Article introduces the Antitrust Consumer Welfare Paradox: It shows that, under all present interpretations of the term “consumer welfare,” there are several sets of circumstances in which the application of antitrust laws may hurt consumers and reduce total social welfare.

The Article shows that, when Robert Bork used the term “consumer welfare,” he confused, misunderstood, and abused basic concepts in economics. The Article argues that, as long as “consumer welfare” remains the stated goal of antitrust law, courts, agencies, and scholars should not overstate the reach or value of antitrust laws. The analysis shows, that while the total surplus standard may be consistent with the antitrust methodology, it has nothing to do with “consumer welfare,” and courts do not appear to apply it.

Table of Contents

Introduction.....	2
I. Consumer Welfare in Antitrust Law	4
A. Economic Definitions.....	6
B. Bork’s Mislabeling (or Confusion).....	9
1. Bork and Bowman on Allocative Efficiency	10
2. Bork’s Original “Sin”	11
3. Bork on the Goal of Antitrust Law	14
4. Bork’s Antitrust Paradox	15
C. Implementation of the Borkean Standard	17
II. Can Antitrust Hurt Consumer Welfare?.....	18

* Associate Professor of Law. The University of Arizona. www.orbach.org; barak@orbach.org. This Article benefited from comments and criticism from Jean Braucher, Josh Gray, Frances Sjoberg, and •.

A. Low Prices for “Bads”	19
B. Low Prices for Status Goods	20
C. Innovation in Durables and Fashion.....	23
III. Possible Interpretations	25
A. Social Welfare.....	25
B. Consumer Surplus.....	27
C. Total Surplus	28
Conclusion	29

INTRODUCTION

All antitrust lawyers and economists know that the stated instrumental goal of antitrust laws is “consumer welfare,” which is a defined term in economics.¹ Nevertheless, they do not know or agree about the meaning of the term in antitrust. This Article chronicles how academic confusion and thoughtless judicial borrowing led to the rise of a label that thirty years later has no clear meaning. The Article reviews the debate over consumer welfare in antitrust law and explains why the term cannot accommodate its common academic interpretations. More specifically, the Article introduces *the Antitrust Consumer Welfare Paradox*: It shows that, under all present interpretations of the term “consumer welfare,” there are several sets of circumstances in which the application of antitrust laws may hurt consumers and reduce total social welfare.

In the 1960s, Robert Bork published a series of provocative articles in which he attacked the state of antitrust policy in the United States.² Most notably, he opened his article *The Goals of Antitrust Policy* with a sentence that captured and popularized the Borkean approach to antitrust: “The life of the antitrust law . . . is . . . neither logic nor experience but bad economics and worse jurisprudence.”³ To correct this chaos, Robert Bork advanced a simple thesis, stating that “existing statutes can be legitimately interpreted only according to the canons of consumer welfare”⁴ and stressed that “[c]onsumer welfare is the

¹ In economics, “consumer welfare” means the benefits a buyer derives from the consumption of goods and services. See *infra* Section I.A.

² Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE 138 (Dec. 1963); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part I*, 74 YALE L. J. 775 (1965); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 75 YALE L. J. 373 (1966); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966); Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242 (1967); Robert H. Bork, *The Supreme Court Versus Corporate Efficiency*, FORTUNE (Aug. 1967); Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L. J. 950 (1968); Robert H. Bork, *Antitrust in Dubious Battle*, FORTUNE 103 (Sep. 1969).

³ Bork, *The Goals of Antitrust Policy*, *supra* note 2, at 242.

⁴ *Id.*

only legitimate goal of antitrust, not because antitrust is economics, but because it is law.”⁵

In 1978, Bork published his influential book *The Antitrust Paradox* that summarizes his work in antitrust law. He started with the proposition that “[a]ntitrust 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.”⁶ The answer that dictated the Borkean approach to antitrust was that Congress adopted the Sherman Act as a “consumer welfare prescription.”⁷

In typical Borkean clarity, Bork elaborated that “[c]ompetition,’ for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.”⁸ Thus, to his approach, competition laws were all about consumer welfare maximization.

Robert Bork is never a man of consensus.⁹ His analysis of the goals of antitrust laws is no exception: his views were fiercely debated by antitrust scholars and practitioners throughout the 1960s, 1970s, and early 1980s.¹⁰ The Supreme Court, however, quickly adopted Bork’s “consumer welfare prescription,” making it the *stated* law of the land.¹¹

In 2005, Herbert Hovenkamp wrote on the dust jacket of his book *The Antitrust Enterprise* that “[a]fter thirty years, the debate over antitrust’s ideology has quieted. Most now agree that the protection of consumer welfare

⁵ *Id.*, at 244.

⁶ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50 (1978).

⁷ *Id.*, at 66.

⁸ *Id.*, at 51.

⁹ *See, e.g.*, Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (1987); ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); *Response Prepared to White House Analysis of Judge Bork’s Record* (the Biden Report), reprinted in 9 CARDOZO L. REV. 219 (1987).

¹⁰ *See, e.g.*, Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PENN. L. REV. 1191 (1977); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051 (1979); Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PENN. L. REV. 1214 (1977).

¹¹ *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 367 (1982); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984).

should be the only goal of antitrust laws.”¹² In the introductory chapter of the book, Hovenkamp stressed that the “only articulated goal of the antitrust laws is to benefit consumers.”¹³

The Antitrust Paradox ended the debate over the goals of antitrust laws and opened a new debate over the meaning of the term “consumer welfare.” Antitrust scholars have known for many years that Robert Bork was wrong in his legislative history study and in his use of economic terms. Yet, we have failed to inform courts that borrow from Bork’s terminology that they are relying on flawed analysis, abuse of economic terms, and use it out of context.

This Article, therefore, informs courts about the meanings and limitations of the term “consumer welfare” in antitrust law. It is a poor term that is inconsistent with the antitrust methodology.

Part I describes the rise of the term “consumer welfare” in antitrust law. Part II shows how the application of antitrust laws is likely to hurt consumer welfare in several sets of common circumstances. Part III examines the common interpretations of the term “consumer welfare” and explains why each one of them is not about consumer welfare maximization. The last part concludes.

I. CONSUMER WELFARE IN ANTITRUST LAW

“Consumer welfare” is a term in economics, but in antitrust law it is still confused and debated.¹⁴ This inability of the jurisprudence to converge into one meaning for a core term is rather embarrassing since antitrust scholars and practitioners tend to brag that “antitrust law is a body of economically rational

¹² HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005).

¹³ *Id.*, at 2.

¹⁴ In 1982, Herbert Hovenkamp already drew attention to the pointless nature of the consumer welfare standard in antitrust law. Herbert Hovenkamp, *Distributive Justice and Antitrust Laws*, 51 *GEO. WASH. L. REV.* 1, 5-6 (1982):

Once we have decided that maximizing consumer welfare is an efficiency goal and not a distributive one, however, we are left wondering exactly what kind of efficiency goal it is. All efficiency goals purport to make the whole of society better off—though they do not all purport to make every individual in that society better off. If ‘maximizing consumer welfare’ is simply a synonym for ‘maximizing everybody’s welfare’, then we still do not have a definition of efficiency, but only a homily that the antitrust laws ought to promote efficiency. We are told that the antitrust laws should strive for efficiency, but are not told how it should be achieved.

See also Joseph F. Brodley, *The Economic Goals Of Antitrust: Efficiency, Consumer Welfare, And Technological Progress*, 62 *N.Y.U. L. REV.* 1020, 1020 (1987) (“efficiency and consumer welfare have become the dominant terms of antitrust discourse without any clear consensus as to what they exactly mean.”); William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Trans-Formation of Modern Antitrust Policy*, 36 *WAYNE L. REV.* 1413 (1990).

principles.”¹⁵ Perhaps other than courts, as this Article shows, nobody seriously believes that the antitrust consumer welfare should have the economic meaning of the term. Rather, today, there are two major groups of thoughts: one argues that the term should mean “consumer surplus”¹⁶ and the other asserts that the appropriate meaning is “total surplus” or “aggregate welfare.”¹⁷

In plain English, “consumer surplus” refers to the perceived welfare of buyers in a particular market. “Total surplus” (or “aggregate welfare”) refers to the perceived welfare of buyers *and* sellers in a particular market. Thus, the total-surplus standard disregards wealth transfers between consumers and sellers.

The reason the term “consumer welfare” in antitrust does not have a clear meaning is that Robert Bork used it while referring to other economic concepts.¹⁸ The cause of the unreasonably long debate over antitrust standards is Bork’s successful campaign to persuade courts that antitrust laws are a “consumer welfare prescription,”¹⁹ when the term is undefined and when nobody, including

¹⁵ RICHARD A. POSNER, *ANTITRUST LAW* viii (2d ed. 2001). *See also* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 3 (Apr. 2, 2007) (“[E]conomics now provides the core foundation for much of antitrust law.”); *U.S. v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990) (Kozinski, J.) (“[L]ike all antitrust cases, this one must make economic sense”).

¹⁶ *See, e.g.*, Broley, *supra* note 14, at 1020-21 (“Consumer welfare in turn is not the identical of efficiency, but a distinct concept that refers to the direct and immediate welfare of the consumers of a specific product.”); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 213 (2008); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Robert H. Lande, *Chicago’s False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631 (1989); Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, 3 COMPETITION POL’Y INT’L 205 (2007); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard* (unpublished manuscript on file with author, 2005).

¹⁷ *See, e.g.*, Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON. PERSP. 155, 156-59 (2007); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL’Y INT’L 3 (2006); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL’Y INT’L 29 (2006); Gregory J. Weden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L. J. 707 (2007).

¹⁸ *See, e.g.*, Donald Dewey, *Antitrust and Economic Theory: An Uneasy Friendship*, 87 YALE L.J. 1516, 1516-17 (1978) (reviewing Bork’s *THE ANTITRUST PARADOX*):

Bork asserts without any qualifications whatever that the only legitimate goal of antitrust is the maximization of consumer welfare. . . . Although Bork does not stop to define terms, his consumer welfare seems to correspond exactly to the economic welfare of the economic theory textbooks.

¹⁹ In a 2005 statement for the Antitrust Modernization Commission, Charles Rule, an Assistant Attorney General for Antitrust during the Reagan Administration and a successful practitioner today, repeated the mistake and insisted that “consumer welfare” and “total welfare” “are just two different labels for the same concept.” Moreover, Rule explained to the Commission

Bork himself, believes that antitrust courts should protect consumer welfare as the term defined in economics.

This Part starts with clarification of very basic concepts in economics. Then, Section I.B briefly chronicles the mislabeling of consumer welfare in Bork's writing. Section I.C describes how the Supreme Court adopted the consumer welfare standard.

A. *Economic Definitions*

In economics, the term “consumer welfare” means the buyer's well-being: the benefits a buyer derives from the consumption of goods and services. The traditional antitrust analysis relies on Marshallian concepts of partial equilibrium analysis.²⁰ This analysis is focused on a subset of the economy, the “relevant market,” in which the buyers are “consumers.” The Marshallian demand curve sums up the demands of consumers, taking prices, preferences, and income as exogenous variables. In this analysis, the consumer welfare is equal to the consumer surplus.²¹ That is, the difference between the amount a buyer is willing to pay for a good and the amount she actually pays for it.

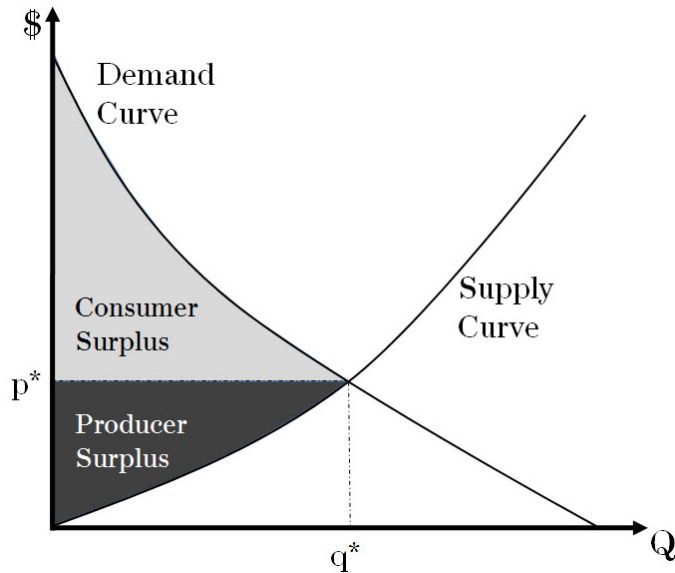
A simplistic two-dimensional graph that is familiar to any person who took Econ 101 illustrates the Marshallian consumer surplus.²²

that “[t]wenty years ago, during the Reagan Administration, “consumer welfare” was commonly understood to be synonymous with ‘total welfare.’” Charles F. Rule, *Consumer Welfare, Efficiencies, and Mergers*, Statement for the Hearing of the Antitrust Modernization Commission “Treatment of Efficiencies in Merger Enforcement” (Nov. 17, 2005). See also Charles F. Rule & David L. Mayer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677 (1988); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703-04 (1986) (“Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income.”)

²⁰ For the Marshallian theory of equilibrium, see ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* (1890).

²¹ ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 199 (4th ed. 1898) (“The excess of the price which [a person] would be willing to pay rather than go without the thing, over that which he actually does pay, is the economic measure of this surplus satisfaction. It may be called *consumer's surplus*.”) (emphasis in original). Until the fourth edition of his masterpiece, Marshall used the term “Consumers' Rent.” He started using the term “consumer's surplus” only in the fourth edition of his book. For the term “consumer's surplus” in Marshall's *PRINCIPLES OF ECONOMICS*, see C. W. Guillebaud, *The Evolution of Marshall's Principles of Economics*, 52 ECON. J. 330, 344-49 (1942). For the history of the concept “consumer's surplus” in economics, see R. W. Houghton, *A Note on the Early History of Consumer's Surplus*, 25 (new series) *ECONOMICA* 49 (1958).

²² For discussion of technical issues related to the measurement of consumer welfare in the presence of income effects and multiple commodities, see Jerry A. Hausman, *Exact Consumer's Surplus and Deadweight Loss*, 71 AM. ECON. REV. 662 (1981); Robert D. Willig, *Consumer's Surplus Without Apology*, 66 AM. ECON. REV. 589 (1976). See generally Akira Takayama, *Consumer Surplus*, in the *NEW PALGRAVE: A DICTIONARY OF ECONOMICS*, vol. 1, 606 (1987).



The graph also depicts the producer surplus that represents the difference between the amount a seller is paid for a good and the seller's cost of providing it. The "total surplus" or "aggregate welfare" in this simplistic model is joint area of the consumer surplus and producer surplus.

The terminology that divides the universe into buyers and sellers may be useful for introductory courses

in economics but is somewhat artificial and has caused some confusion in legal oriented minds.²³ Most transactions can be reframed to present the seller as buyer and vice versa. To illustrate this point, consider an insurance transaction. The insured parties purchase policies from insurers and sell the latter risks: They are buyers *and* sellers in these transactions, but ordinarily we think about them as buyers. For analytical convenience, we tend to classify one side of a transaction as "consumer" and the other side as "seller."

In his popular textbook, *Principles of Economics*,²⁴ Gregory Mankiw explains the potential differences between consumer surplus and consumer welfare:

Imagine that you are a policymaker trying to design a good economic system. Would you care about the amount of consumer surplus? Consumer surplus . . . measures the benefit that buyers receive from a good *as the buyers themselves perceive it*. Thus, consumer surplus is a good measure of economic well-being if policymakers want to respect the preferences of buyers.

In some circumstances, policymakers might choose not to care about consumer surplus because they do not respect the

²³ In the 2006 Milton Handler Antitrust Review Lecture, Commissioner Thomas Rosch explained why, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, he took the position against the joining of the FTC to the Solicitor General's amicus briefs that expressed the position that antitrust laws protect buyers and sellers equally. Rosch noted that "[i]n my view, the antitrust laws protect consumers— and by 'consumers' I mean consumers who buy the output in the relevant market." J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at Weyerhaeuser*, 2007 COLUM. BUS. L. REV. 353, 359 (2007).

²⁴ N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* (5th ed. 2009). As of January 2009, over 300 education institutions in the United States have adopted the book. More than 600 institutions have adopted N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* (5th ed. 2009). Email from John Carey, Cengage Learning, to author (Jan. 11, 2010) (on file with author).

preferences that drive buyer behavior. For example, drug addicts are willing to pay a high price for heroin. Yet we would not say that addicts get a large benefit from being able to buy heroin at a low price (even though addicts might say they do). From the standpoint of society, willingness to pay in this instance is not a good measure of the buyers' benefit, and consumer surplus is not a good measure of economic well-being, because addicts are not looking after their own best interests.²⁵

The point that Professor Mankiw makes in his textbook is rather intuitive. Every antitrust scholar and practitioner possesses economic intuitions at this level that must inform antitrust analysis. Antitrust law therefore cannot maximize consumer welfare. The antitrust methodology focuses on one market, while conceptually it may maximize consumer surplus or total surplus it cannot maximize consumer welfare as the term defined by economists. Antitrust law does even not pretend to address welfare optimization issues. Its methodology is all about surplus – perceived values in particular markets.

Four concepts of efficiency also call for definition: static efficiency, productive efficiency, allocative efficiency, and dynamic efficiency.²⁶ *Static efficiency* is optimization of production within present technologies to minimize deadweight loss.²⁷ There are two forms of static efficiency: productive efficiency and allocative efficiency. *Productive efficiency* (or technical efficiency) describes the level of utilization of resources in the economy and is maximized with various combinations on the production possibility frontier of the economy. Put simply, optimal productive efficiency exists where the economy utilizes resources in the least expensive way possible. *Allocative efficiency* is focused on the consumer's willingness to pay. Maximum allocative efficiency is attained when the cost of resources used in production is equal to the consumer's willingness to pay. That is, allocative efficiency is maximized when market price is equal to marginal cost.²⁸ *Dynamic efficiency* means increase in resources through investments in

²⁵ MANKIW, *supra* note 24, at 142 (emphasis in original).

²⁶ For an introductory discussion of these terms see LOUIS M. B. CABRAL, INTRODUCTION TO INDUSTRIAL ORGANIZATION 26-28 (2000).

²⁷ Many courts stress the value of static efficiency in one form or another. *See, e.g.*, Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 4 (1958):

The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

²⁸ Another common definition of allocative efficiency is Pareto optimality, which is a resource distribution in which no voluntary exchange could make a person better off without making someone else worse off. *See* Walter Adams et al., *Pareto Optimality and Antitrust Policy: The Old Chicago Policy and the New Learning*, 58 S. Econ. J. 1 (1991).

education and research and development. Since the 1950s, it is well established that dynamic efficiency is the major source of economic growth.²⁹

Robert Bork connected most of these concepts into one antitrust agenda, in which “[t]he whole task of antitrust can be summed up as an effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”³⁰ Bork did not rely on any economic model to connect these concepts and no economist has ever developed a robust model that ties them together in one framework.

B. Bork’s Mislabeling (or Confusion)

In a successful crusade that made consumer welfare the instrumental goal of antitrust law in the United States, Robert Bork blamed others for “bad economics and worse jurisprudence.”³¹ A reading of Bork’s study of the legislative intent of the Sherman Act shows his failure to grasp economics.³² His analysis does *not* support the conclusion that Congress passed the Sherman Act as a “consumer welfare prescription.”

Robert Bork presented a detailed analysis of the legislative history and at the very least he was wrong in creating connections among economic concepts. This critique does not examine Bork’s study of historical facts. No nuanced retrospective account is bullet proof. However, all other studies of the legislative history of the Sherman Act conclude that Bork was also wrong and misleading with the study or presentation of the facts.³³ This point is outside the scope of this Article.

²⁹ Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957). For potential implications of dynamic efficiency in antitrust law see J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009).

³⁰ BORK, *supra* note 6, at 91.

³¹ See *supra* note 3 and accompanying text.

³² Bork, *Legislative Intent and the Policy of the Sherman Act*, *supra* note 2.

³³ See, e.g., Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT’L REV. L. & ECON. 73 (1985); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQ. 263 (1992); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, *supra* note 10; WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53-99 (1954); Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQ. 242 (1992); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988); George J. Stigler, *The Origin of the Sherman Act*, 14 J. L. STUD. 1 (1985); HANS THORELLI, THE FEDERAL ANTITRUST POLICY 224-32 (1955); Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 REV. AUSTRIAN ECON. 275 (2002).

1. *Bork and Bowman on Allocative Efficiency*

In December 1963, Robert Bork and Ward Bowman, then two professors at Yale Law School, published in *Fortune Magazine* an article titled “*The Crisis in Antitrust*.”³⁴ They introduced the American public to the unwritten views of Aaron Director of Chicago Law School, who inspired a generation of great intellectuals.³⁵

The crisis that Bork and Bowman described emerged from the tension between the “policy of preserving competition and the policy of preserving competitors from their more energetic and efficient rivals.”³⁶ The crisis was all about “[a]nti-free-market forces [that had] the upper hand and [were] steadily broadening and consolidating their victory.”³⁷ Bork and Bowman perceived the crisis in antitrust as an existential threat because it was “an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency.”³⁸ Bork and Bowman, free-market advocates, explained why society must preserve competition:

[C]ompetition provides society with the maximum output that can be achieved at any given time with the resources at its command. Under a competitive regime, productive resources are combined and separated, shuffled and reshuffled in search for greater profits through greater efficiency. . . . Competition is desirable, therefore, because it assists in achieving a prosperous society and permits individual consumers to determine by their actions what goods and services they want most.³⁹

Put simply, Bork and Bowman believed that competition necessarily promotes allocative efficiency, which in turn is a driving force of prosperity and, as such, it serves individual consumers as well. In the early 1960s, this view probably was solid among many economists.

³⁴ This article developed into a provocative dialogue with Harlan Blake and William Jones that was published by *Fortune Magazine*. *Columbia Law Review* reprinted the entire dialogue in 1965.

³⁵ In the version published in *Columbia Law Review*, Bork and Bowman wrote: “The authors are indebted to Professor Director by whom they were introduced to the general economic approach to antitrust problems represented in this article.” 65 COLUM. L. REV. 363, 365 note 5 (1965). Aaron Director published very few works. One of his most influential publications includes some of the ideas that Robert Bork developed. See Aaron Director and Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956). For Aaron Director’s influence on the Chicago School of Antitrust Analysis, see generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

³⁶ Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 138.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*, at 139.

2. Bork's Original "Sin"

In 1966, Robert Bork published his article "*Legislative Intent and the Policy of the Sherman Act*."⁴⁰ The purpose of the article was to learn the goal of the Sherman Act from its legislative history. This inquiry was necessary to settle the controversy in antitrust, because like many others Bork believed that the "starting point is the question of legislative intent."⁴¹

Bork concluded his investigation with the conclusive finding that "Congress intended the courts to implement . . . only that value we would today call consumer welfare,"⁴² although "[t]he legislators did not . . . speak of consumer welfare with the precision of a modern economist, . . . their meaning was unmistakable."⁴³ In fact, Bork stressed, "[t]he legislative history . . . contains no colorable support for application by courts of any value premise or policy other than maximization of consumer welfare."⁴⁴

Despite these unequivocal statements, the facts that Bork presented had little to do with conventional economic definitions of consumer welfare. When Bork wrote "consumer welfare," he had in mind "allocative efficiency" and other concepts.

"Consumer welfare," Bork believed, was "maximization of wealth or consumer want satisfaction."⁴⁵ The implementation of this value "requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output."⁴⁶ More specifically, Bork explained, when Congress enacted the Sherman Act "[i]t was generally assumed . . . that the ends to be accomplished . . . must . . . be of a commercial nature. This assumption would not impose a consumer-want-satisfaction rationale upon the statute – the category of commercial purposes comprises *more than that*."⁴⁷ Put simply, the Borkean consumer welfare was related to "efficiency" and "social wealth." As a starting point, this is a deviation from the definition of the term "consumer welfare."

Bork indeed believed that efficiency necessarily improves consumer welfare. For example, he found support for his argument in the *per se* prohibition against cartel agreements, "whose purpose is not to produce efficiency but merely

⁴⁰ 9 J. L. & ECON. 7 (1966).

⁴¹ *Id.*, at 7.

⁴² *Id.*

⁴³ *Id.*, at 10.

⁴⁴ *Id.*

⁴⁵ *Id.*, at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*, at 13 (emphasis added).

to eliminate competition.”⁴⁸ This outright prohibition, he argued, could be “explained only by a concern for consumer well-being.”⁴⁹

Bork started his investigation with the first draft of the Sherman Act that sought to outlaw “arrangements, contracts, agreements, trusts, or combinations” that “prevent full and free competition” or “designed, or which tend to advance the cost to consumer.”⁵⁰ Bork clarified that “[Senator John] Sherman employed these two criteria of illegality in every measure he presented to the Senate.”⁵¹ He argued that the first test, “full and free competition,” “can be reconciled only with a consumer-welfare policy. The second test [cost to consumer] is even more explicit.” Bork, therefore, concluded that “[Senator] Sherman wanted the courts not merely to be influenced by the consumer interest but to be controlled completely by it.”⁵² Bork did not bother to explain, why when Senator Sherman talked about “full and free competition” as a criterion distinctive from “cost to consumer,” he must have had consumer-welfare policy in mind.

Toward the end of the article, Bork returned to Senator Sherman’s statements about Section 1 of his bill. Bork emphasized Senator Sherman’s choice of words: “The first section . . . would be construed liberally, with a view to promote its object. . . . *[The courts] will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade.*”⁵³ Bork realized that this distinction was about efficiency and competition,⁵⁴ yet he considered these values as mere proxies for consumer welfare.⁵⁵

Bork cited texts from the legislative history of the Sherman Act and insisted that they all meant one thing: an intent to protect consumer welfare. For example, in the context of monopolistic mergers and predatory practices, Bork cited the following statement made by Senator Sherman:

The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation

⁴⁸ *Id.*, at 11.

⁴⁹ *Id.*

⁵⁰ *Id.*, at 15.

⁵¹ *Id.*

⁵² *Id.*, at 16.

⁵³ *Id.*, at 36.

⁵⁴ *Id.*

⁵⁵ *Id.*

companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry . . . it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public. . . . [T]he individuals engaged in it should be punished as criminals.⁵⁶

As in any other context, Bork concluded that the “emphasis in this passage is upon harm done to consumers.”⁵⁷ He did not consider the possibility that the politician Senator Sherman simply addressed his audience while discussing concerns to competition. Every novice politician knows that he can gain some political capital by arguing that his agenda also promotes consumer’s interests, or at least that he could lose some capital if he does not make arguments in favor of consumers and individuals. It is difficult to find a political text, even from the nineteenth century, and identify one interest that its speaker intended to promote.

Bork believed that efficiency *necessarily* promotes consumer welfare. He wrote: “Congress’ position with respect to efficiency cannot be explained on any hypothesis other than consumer welfare. . . . [Senator] Sherman took great pains to stress that his bill would in no way interfere with efficiency.”⁵⁸ Bork further rationalized Senator Sherman’s objections to mergers to monopoly as an exception to efficiency that consumer welfare justified.⁵⁹

This exception is interesting because it was the only text Bork provided that was exclusively about consumer welfare, but Bork argued that on this point Senator Sherman was “not necessarily correct.”⁶⁰ Bork cited Senator Sherman providing the same insights that Oliver Williamson formalized many years later:⁶¹

It is sometimes said of these combinations . . . that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination.⁶²

⁵⁶ *Id.*, at 25-26.

⁵⁷ *Id.*, at 26.

⁵⁸ *Id.*

⁵⁹ *Id.*, at 27.

⁶⁰ *Id.*, at note 64.

⁶¹ See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105 (1969); Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PENN. L. REV. 699 (1977).

⁶² Bork, *Legislative Intent and the Policy of the Sherman Act*, *supra* note 2, at 27.

Bork refused to consider the possibility that a merger could harm consumer welfare. In his mind, “[a] monopolistic merger may create such efficiency that the net effect will be an increase in output. There is no way of telling in advance, or even afterward, in all probability, whether the net effect of such a merger will be restriction or increase of output.”⁶³ Bork therefore attacked the ability to evaluate mergers, *ex ante* and *ex post*.

Robert Bork reduced a very complex political process into one clear economic goal because he believed that the key to good policy is in the legislative intent. In itself, this pursuit is oversimplistic: complex political processes require compromises among multiple groups that have various goals.⁶⁴ Moreover, Bork used the term “consumer welfare” rather arbitrarily with not much attention to the standard economic definition of the term.

Competition, efficiency, wealth maximization, and consumer welfare are related concepts in microeconomics theory, but they are not synonyms and may have inverse relations under certain conditions. To illustrate this point, suffice it to consider again Professor Mankiw’s text for undergraduate students.⁶⁵ Markets for addictive substances may be very competitive with firms that operate very efficiently. These market properties, however, do not suggest that the markets serve social prosperity and consumer welfare. The contrary is often the truth. Competition and efficiency in markets for addictive goods harm consumers and are socially costly. The classic example here is tobacco products: the efficiency of tobacco companies and competitiveness of markets are not related to consumer welfare. Low prices and more cigarettes can only hurt consumers.⁶⁶ Robert Bork, however, believed that competition, efficiency, wealth maximization, and consumer welfare align in theory and practice. He was wrong.

3. *Bork on the Goal of Antitrust Law*

In 1967, a year after the publication of his article on the legislative history of the Sherman Act, Robert Bork published in the prestigious *American Economic Review* an essay that consolidated and clarified his views about the goals of antitrust law.⁶⁷

Bork stated at the outset that “existing [antitrust] statutes can be legitimately interpreted only according to the canons of consumer welfare, defined as minimizing restrictions of output and permitting efficiency, however gained, to

⁶³ *Id.*, at note 64.

⁶⁴ For a more nuanced analysis of the legislative history of the Sherman Act, see DiLorenzo, *supra* note 33; Grandy, *supra* note 33; Hazlett, *supra* note 33; LETWIN, *supra* note 33, at 53-99; Stigler, *supra* note 33; THORELLI, *supra* note 33.

⁶⁵ See *supra* notes 24-25 and accompanying text.

⁶⁶ See *infra* Section II.A.

⁶⁷ Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242 (1967).

have its way.”⁶⁸ Bork, therefore, clearly defined consumer welfare as allocative efficiency, or more accurately, failed to acknowledge possible contradictions between the concepts.

To the extent that any doubts were left, Bork explained his logic: “The preference for competitive rather than monopolistic resource allocation is most clearly explained and firmly based upon a desire to maximize output as consumers value it. The language of the [antitrust] statutes, then, clearly implies a consumer welfare policy.”⁶⁹ This logic was clearly popular at the time and during the Reagan Administration,⁷⁰ but it never relied on solid foundations.⁷¹

Bork believed that the consumer welfare standard should have governed antitrust law also because of the judiciary weakness. Twenty years before his failed nomination to the Supreme Court,⁷² Robert Bork already disliked the “existence of an unelected, somewhat elitist, and undemocratic judicial institution.”⁷³ Therefore, he argued that “exclusive adherence to a consumer welfare test is the only legitimate policy for the Supreme Court under present statutes precisely because of the Court’s elitist, unrepresentative nature.”⁷⁴ What is implied, of course, is his own Borkean consumer welfare standard.⁷⁵

4. Bork’s Antitrust Paradox

In 1978, Bork published *The Antitrust Paradox*, which is rightfully regarded as one of the most influential works in antitrust law. In his book, Bork explained the term “consumer welfare:”

Consumer welfare is the greatest when society’s economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation. . . . Consumer welfare, as the term is used in antitrust, has no sumptuary or ethical component, but permits consumers to

⁶⁸ *Id.*, at 242.

⁶⁹ *Id.*, at 245.

⁷⁰ *See supra* note 19.

⁷¹ *See infra* Part II.

⁷² *See supra* note 9.

⁷³ Bork, *The Goals of Antitrust Policy*, *supra* note 2, at 243.

⁷⁴ *Id.*

⁷⁵ Many economists and lawyers regarded the Borkean consumer welfare as “allocative efficiency.” *See, e.g.*, Williamson, *Allocative Efficiency and the Limits of Antitrust*, *supra* note 61, at 105 (stating that in his 1967 article, Bork “advanced what is essentially an allocative efficiency standard for antitrust.”); Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1217 (1977) (“Professor Bork . . . has argued that the legislative history of the Sherman Act warrants the conclusion that allocative efficiency was the sole concern of Congress.”)

define by their expression of wants in the marketplace what things they regard as wealth.⁷⁶

Thus, Bork explicitly equated the term “consumer welfare” with “the wealth of the nation,”⁷⁷ a term that economists would understand as “social welfare.”

Conceptual confusions appeared in Bork’s early articles could not exist in 1978. First and foremost, when Bork wrote *The Antitrust Paradox*, he ignored scholars’ comments that his consumer welfare meant allocative efficiency.⁷⁸ Second, Bork should have known that efficiency and consumer welfare may not necessarily align. In response to the 1960s debate over the goals of antitrust laws, in 1968, Oliver Williamson published a “naive tradeoff model” that shows that a merger, which leads to efficiencies *and* price increases, may be socially desirable, even though it hurts consumers.⁷⁹ The qualifications of the model stressed several other fundamental flaws in Bork’s analysis.⁸⁰ Williamson essentially formulated, developed, and analyzed the intuitive point that Senator Sherman made in the discussion of his bill, which Bork described as “not necessarily correct.”⁸¹

In *The Antitrust Paradox*, Bork dedicated a chapter to respond to Williamson.⁸² His three major arguments were as follows: (a) We cannot possibly calculate the relevant values and, therefore, Williamson’s model does not offer practical guidance;⁸³ (b) in his opinion, economic analysis would show that cost saving or social loss does not exist and then the decision would be easy;⁸⁴ and (c) all consumers are also owners of businesses, and hence they must benefit from monopolistic price increases, so efficiency with price increases would not hurt the average consumer.⁸⁵ Putting aside the speculative nature of these arguments and their reliance on rigid assumptions, the Borkean consumer welfare has never been anything but some weak form of allocative efficiency. It was and still is an abuse of term. Robert Bork confused, misunderstood, and abused basic concepts in economics when he popularized consumer welfare as the prescription of antitrust laws.

⁷⁶ BORK, *supra* note 6, at 90.

⁷⁷ *Id.*

⁷⁸ *See supra* note 75.

⁷⁹ Williamson, *Economics as an Antitrust Defense*, *supra* note 61.

⁸⁰ *Id.*, at 23-31.

⁸¹ Williamson did not refer to Senator Sherman in his article. For the discussion of this point, see *supra* notes 59-63 and accompanying text.

⁸² BORK, *supra* note 6, ch. 5.

⁸³ *Id.*, at 108.

⁸⁴ *Id.*

⁸⁵ *Id.*, at 110.

C. Implementation of the Borkean Standard

The Supreme Court endorsed Bork's view that the only goal of antitrust laws is to enhance consumer welfare,⁸⁶ but the Court never addressed the meaning of the term. In June 1979, the Supreme Court handed down *Reiter v. Sonotone Corp.*,⁸⁷ citing Robert Bork as the authority for the statement that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"⁸⁸ When the justices reached this conclusion, one of the documents available to them was an Amicus Curiae brief for the United States, which pressed the point that "the primary purpose of the Sherman Act was consumer protection."⁸⁹ Frank Easterbrook, then a Deputy Solicitor General, was among the leading authors of the brief. Easterbrook and Bork were disciples of Aaron Director and members of the Chicago School of Antitrust. Easterbrook's published views about the goals of antitrust laws are essentially Borkean.⁹⁰

Despite the reference to Bork, it is difficult to read the Supreme Court's decisions and reach a conclusion that the Court intended to give the term "consumer welfare" any Borkean meaning, or any beyond the term's literal meaning.

In *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* ("NCAA"),⁹¹ the Supreme Court used Bork's "consumer welfare prescription"⁹² and ruled that a "restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."⁹³ By highlighting that in a possible contrast between consumer preferences and output the consumer preference prevails, the Court implicitly (and possibly unintentionally) rejected total welfare theories or welfare tradeoff defenses for mergers.⁹⁴

⁸⁶ See, e.g., *Reiter*, 442 U.S. at 343; *Maricopa County Med. Soc'y*, 457 U.S. at 367; *NCAA*, 468 U.S. at 107.

⁸⁷ 442 U.S. 330 (1979).

⁸⁸ *Id.*, at 343.

⁸⁹ Brief for the United States as Amicus Curiae, *Reiter v. Sonoton Corp.*, 1979 WL 213494 (1979).

⁹⁰ See, e.g., Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986) ("In the long run consumers gain the most from a policy that emphasizes allocative and productive efficiency."). Easterbrook did not confuse economic terms but noted that consumer welfare was a "close proxy" of efficiency. *Id.*, at 1703-04.

⁹¹ 468 U.S. 85.

⁹² *Id.*, at 107 (citing *Reiter*, 442 U.S. at 343).

⁹³ *Id.*

⁹⁴ The welfare tradeoff defense was developed and popularized by Oliver Williamson, who argued that a merger that would result in some consumer welfare losses should still be approved if its welfare gains are greater than consumer welfare losses. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PENN. L. REV. 699 (1977).

In *Brooke Group* and *Weyerhaeuser*, two decisions that involved unsuccessful predation schemes,⁹⁵ the Supreme Court distinguished between consumer welfare and total welfare and clarified, again, that the standard in antitrust law is consumer welfare.⁹⁶ The Court emphasized that, although unsuccessful predation may be socially undesirable, it is a “boon to consumers” and therefore legal under antitrust laws.⁹⁷ In these two decisions, the Supreme Court filled the consumer-welfare standard with a clear consumer oriented meaning.⁹⁸ Thus, Court appears to believe that the “consumer welfare” standard is about consumers, rather than about efficiency.

II. CAN ANTITRUST HURT CONSUMER WELFARE?

The consumer welfare paradox provides that, under present interpretations of the term “consumer welfare,” there are several sets of circumstances in which the application of antitrust laws may hurt consumers and reduce total social welfare. This Part examines three sets of circumstances in which the combination of conventional application of antitrust laws and standard consumer preferences is likely to hurt consumers. These categories of circumstances include (1) low prices for “bads,” (2) low prices for status goods, and (3) the pursuit for innovation in durables and fashion goods.

There are many other cases in which revealed preferences are likely to lead to welfare losses, but there is no need to count them all. The existence of some situations means that the antitrust consumer welfare is not robust and has exceptions. Or more accurately, the term “consumer welfare” cannot accomplish its meaning in economics. The standard application of antitrust laws may result in consumer welfare losses, irrespective of the applied interpretation.

⁹⁵ Predation strategies are pricing or other business schemes in which a business incurring short-term losses with prospects to exclude competition and to recover these losses and to make profit in the long-run. The simplest form of predation is predatory pricing in which a business sells products at prices below cost, incurs losses but eliminate competitors that cannot match its prices. Later on the business raise prices and make profit. In theory and practice, the design, implementation, identification, and verification of predatory pricing strategies tend to be nuanced. An “unsuccessful predation” is a practice in which the predator cannot expect to recover the losses suffered.

⁹⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

⁹⁷ *Brooke Group*, 509 U.S., at 221-24; *Weyerhaeuser*, 549 U.S., at 321-25.

⁹⁸ In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982), the Supreme Court quoted a 1948 decision, declaring that “[the Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.” *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Statements of this kind do not explain what underlying goals may justify such protection.

A. *Low Prices for “Bads”*

In antitrust economics price and output are variables that tend to have a simple inverse relationship. Antitrust laws focus on low prices in order to allow consumers to consume more.⁹⁹ For example, in *Atlantic Richfield*,¹⁰⁰ the Supreme Court stressed this point: “Low prices benefit consumers regardless of how those prices are set, and . . . they cannot give rise to antitrust injury.”¹⁰¹

Indeed, the consumption of the vast majority of products tends to benefit consumers up to certain point. Very few legal products and services are categorically bad at any level of consumption, regardless of the normative point of view. Ordinarily, society outlaws “bads,” such as certain narcotics and certain types of services, such as peculiar sex services and child labor.¹⁰² In modern society, tobacco products perhaps remain as the last legal bads: there is scientific consensus that tobacco products harm users.¹⁰³ Many other legal products and services are *arguably* undesirable. Obvious examples include abortions, alcohol, firearms, gambling, pornography, and sex services. Putting aside normative aspects related to these products and services, their harm to consumer is related to the manner and level of consumption and use. In this sense, these products and services are similar to ordinary goods. For the purpose of discussion, most agree that modern society makes at least one “bad” legally available for consumers.

The actual existence of bads suggests that low prices are not good for consumers. Therefore, the application of antitrust laws in markets for bads to protect low prices is inconsistent with any coherent view of consumer welfare or social welfare.¹⁰⁴

The tobacco industry has generated many interesting antitrust cases,¹⁰⁵ but the most famous recent one is *Brooke Group Ltd. v. Brown & Williamson Tobacco*

⁹⁹ See, e.g., HOVENKAMP, *supra* note 12, at 13 (“While we often think of antitrust as troubled by high prices, it is better to think of antitrust’s main concern in terms of restrictions on output.”)

¹⁰⁰ 495 U.S. 328 (1990).

¹⁰¹ *Id.*, at 340.

¹⁰² For the history of the child labor debate in the United States, see HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* (2002); KRISTE LINDENMEYER, *A RIGHT TO CHILDHOOD: THE U.S. CHILDREN’S BUREAU AND CHILD WELFARE, 1912–1946* (1997).

¹⁰³ U.S. Dep’t of Health, Educ. & Welfare, Public Health Service Publication No. 1103, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964). Obviously, there are numerous additional references that support this point, but the 1964 Surgeon General’s report on the adverse effects of tobacco use on health is the most classic reference. See also the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1845 (2009).

¹⁰⁴ See generally Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321 (2005).

¹⁰⁵ See, e.g., *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (S.D.N.Y. 1906); *United States v. Am. Tobacco Co.*, 164 F. 700 (S.D.N.Y. 1908); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Steers v. United States*, 192 F. 1, (1911); *FTC v. Am. Tobacco Co.*, 274 U.S. 543 (1927); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946); *P. Lorillard Co. v. FTC*,

*Corp.*¹⁰⁶ In *Brooke Group*, the Supreme Court refused to condemn the practice of failed predation in the tobacco industry because it resulted in lower prices for consumers. The Court acknowledged “the antitrust laws’ traditional concern for consumer welfare and price competition”¹⁰⁷ and distinguished between condemned predatory pricing that “poses a dangerous probability of actual monopolization”¹⁰⁸ and “[unsuccessful] predatory pricing [that] produces lower aggregate prices in the market, and [enhances] consumer welfare.”¹⁰⁹ The Supreme Court expressly stated that unsuccessful predation was socially undesirable, but because the practice supposedly benefited the consumer, the Court held that it was legal under antitrust laws: “Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.”¹¹⁰

Thus, for goods or bads, antitrust laws appear to welcome low prices regardless of actual impact on consumer welfare.¹¹¹ Because antitrust laws are blind to the possibility that high prices for bads may enhance consumer welfare, there is no need to address the case of products and services whose harm to consumer is related to level of use.

B. Low Prices for Status Goods

The standard antitrust analysis that equates low prices with consumer welfare relies on the observation that the consumer always prefers the lowest possible price.¹¹² However, the appeal of certain products is in the exclusive status that their high prices confer.¹¹³ Exclusivity of status goods is a defined

186 F.2d 52 (4th Cir. 1950); *United States v. Cigarette Merch. Ass’n*, 18 F.R.D. 497 (S.D.N.Y. 1955). See generally Crane, *supra* note 104, at 327-39.

¹⁰⁶ 509 U.S. 209 (1993).

¹⁰⁷ *Id.*, at 221.

¹⁰⁸ *Id.*, at 222 (citation omitted).

¹⁰⁹ *Id.*, at 224.

¹¹⁰ *Id.*

¹¹¹ In the summer of 1997 the four largest tobacco companies, Philip Morris, Inc., R.J. Reynolds Tobacco Co., Inc., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co., proposed that their industry receive a partial exemption from antitrust laws as part of the proposed Master Settlement Agreement. The Federal Trade Commission expressed formal opposition to this exemption. See Prepared Statement by Chairman Robert Pitofsky before Subcommittee on Antitrust, Business Rights and Competition Committee on the Judiciary United States Senate on the Proposed Tobacco Settlement (Oct. 29, 1997).

¹¹² See, e.g., *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 360 (1982) (“Normally consumers search for high quality at low prices.”).

¹¹³ See generally THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY IN THE EVOLUTION OF INSTITUTIONS* 154-55 (1899):

Goods are produced and consumed as a means to the fuller unfolding of human life and their utility consists, in the first instance, in their efficiency as a means to this end. . . . But the human proclivity to emulation has

product feature, just like reliability to news, age to red wine, and accuracy to clocks.¹¹⁴ Some consumers are willing to pay for this feature, some are unwilling to pay for it, and some may even ridicule such willingness to pay. But as the saying goes: *de gustibus non est disputandum* – there is no disputing about tastes.¹¹⁵

The world of collectibles offers an illustration for products that certain consumers want more when prices go up. Collectible manufacturers must market their products in a manner that prevents price depreciation. Low prices that make collectibles appear cheap may undermine their value. To illustrate, consider the case of Edna Hibbel Corporation,¹¹⁶ a manufacturer of artwork

seized upon the consumption of goods as a means to an invidious comparison, and has thereby invested consumable goods with a secondary utility as evidence of relative ability to pay.

Arthur Pigou briefly discussed some aspects of “desire[s] to possess what other people possess” and “desire[s] to possess what other people do not possess.” ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 225–28 (4th ed. 1932). See also Henry Smith, *Discontinuous Demand Curves and Monopolistic Competition: A Special Case*, 49 Q. J. ECON. 542 (1935) (discussing the case of discontinuous demand curves, in which changes in established prices, even downward, could lead to decline in demand); Frank W. Taussig, *Price Maintenance*, 6 AM. ECON. REV. 170, 172 (Supp. 1916) (arguing that the “psychology of demand” is one of the explanations for resale price maintenance and noting that “[i]f diamonds were to become very plentiful and very cheap, it is probable that people would buy not more of them than now, but less”). For modern literature on this point, see ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* (1999); ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985); Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349 (1996); Robert L. Basmann et al., *A Note on Measuring Veblen’s Theory of Conspicuous Consumption*, 70 REV. ECON. & STAT. 531 (1988); Kaushik Basu, *Monopoly, Quality Uncertainty and ‘Status’ Goods*, 5 INT’L J. INDUS. ORG. 435 (1987); B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994); Ottmar L. Braun & Robert A. Wicklund, *Psychological Antecedents of Conspicuous Consumption*, 10 J. ECON. PSYCHOL. 161 (1989); Angela Chao & Juliet B. Schor, *Empirical Tests of Status Consumption: Evidence from Women’s Cosmetics*, 19 J. ECON. PSYCHOL. 107 (1998); Giacomo Corneo & Olivier Jeanne, *Snobs, Bandwagons, and the Origins of Social Customs in Consumer Behavior*, 32 J. ECON. BEHAVIOR & ORG. 333 (1997); Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101 (1985); Peter Jason Kalman, *Theory of Consumer Behavior When Prices Enter the Utility Function*, 36 ECONOMETRICA 497 (1968); Giovanni B. Ramello, *What’s in a Sign? Trademark Law and Economic Theory*, 20 J. ECON. SURVEYS 547 (2006).

¹¹⁴ Another type of goods for which the demand falls when prices decline is Giffen goods, first described by Alfred Marshall in 1895. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 109–10 (8th ed. 1920) (1895). Economists have remained skeptical of the existence of Giffen goods. See, e.g., Gerald P. Dwyer & Cotton M. Lindsay, *Robert Giffen and the Irish Potato*, 74 AM. ECON. REV. 188 (1984); George J. Stigler, *Notes on the History of the Giffen Paradox*, 55 J. POL. ECON. 152 (1947); Sherwin Rosen, *Potato Paradoxes*, 107 J. POL. ECON. S294 (1999); cf. William R. Dougan, *Giffen Goods and the Law of Demand*, 90 J. POL. ECON. 809 (1982).

¹¹⁵ For some antitrust implications on this point, see Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261 (2008); Barak Y. Orbach, *The Image Theory: RPM and the Allure of High Prices*, ANTITRUST BULL. (2010, forthcoming).

¹¹⁶ *Winn v. Edna Hibbel Corp.*, 858 F.2d 1517 (11th Cir. 1988).

collectibles. Sheltering behind the *Colgate* doctrine,¹¹⁷ Edna Hibel terminated distribution agreements with retailers that sold its products below suggested retail prices. Through this strategy, Edna Hibel successfully maintained minimum retail prices. Dismissing the suit of a terminated retailer, the court explained the logic of Edna Hibel's interest in high prices:

Hibel had a strong interest in maintaining its suggested retail pricing structure. Its products were collectors' items, and those who purchased them did so in part because over time they appreciated in value. Hibel discouraged all of its dealers from price cutting so as not to downgrade the market for its products.¹¹⁸

In *Leegin*,¹¹⁹ the landmark case in which the Supreme Court overruled the ninety-six year old *per se* ban on resale price maintenance,¹²⁰ a fashion-goods manufacturer adopted resale price maintenance among other reasons because of the concern that discounts harmed its products "brand image and reputation."¹²¹ Five justices were persuaded that antitrust laws should not prohibit resale price maintenance. Indeed, one of the oldest justifications that manufacturers provide for the practice is that uniform retail prices for branded goods maintain the product exclusive image, thereby alluring consumers and increasing revenues.¹²²

Put simply, the premise "paying less is always better" is correct in the sense that all individuals prefer to pay for any particular goods the lowest possible price available. However, some consumers are willing to pay premium prices for certain branded goods, as long as these premia buy them exclusivity and status. For their own reasons these consumers desire to belong to exclusive clubs that most people cannot afford or for which they are unwilling to pay. These consumers will happily purchase branded goods for discounted prices and may even invest in searching for discounts and bargains. However, their interest in a brand will decline (or at least transform) once its low prices are widely available because the brand loses its exclusivity. Thus, unless limited discounts are available to a selected group of consumers, the premise that "paying less is always better" may not hold for consumers who seek exclusivity and status. For some consumers, high prices are a product feature that confers exclusivity and status.

¹¹⁷ *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919); *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Under the *Colgate* doctrine, a manufacturer may unilaterally terminate its relationship with a retailer that sells its products at prices below the manufacturer's suggested resale prices. Manufacturers used this doctrine to circumvent the *per-se* prohibition against resale price maintenance until the Supreme Court overruled this ban in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹¹⁸ *Id.* at 1518.

¹¹⁹ *Leegin Creative Leather Prods.*, 551 U.S. 877.

¹²⁰ Resale price maintenance is the practice whereby a manufacturer sets pricing rules for retailers.

¹²¹ *Id.*, at 883.

¹²² *See Orbach, Antitrust Vertical Myopia*, *supra* note 115; Orbach, *The Image Theory*, *supra* note 115.

The antitrust consumer-welfare paradigm conveniently ignores the common circumstances in which consumers are interested in exclusivity and status and are willing to pay for them. The consumers' revealed preferences in these circumstances may be unwise, they may undermine their own well-being, and reduce social welfare, but antitrust laws do not offer relevant preference-shaping mechanisms to address the issue.¹²³ Pressures for low prices, including bans on resale price maintenance, serve consumers perhaps in most circumstances but not in all.

To summarize this point, assuming that antitrust laws intend to benefit consumers and serve their preferences, present formulations of the antitrust consumer welfare goal appear to be inconsistent with common desires for status and exclusivity.

C. Innovation in Durables and Fashion

In his 1967 article, *The Goals of Antitrust Policy*, Robert Bork noted that:

[T]he propriety of 'progressiveness' as an antitrust criterion is not obvious. . . . Progress . . . is obviously not costless to consumers. It requires the devotion of resources to research and development that would otherwise be devoted to the production of other goods and services. Progress will occur even without special consideration by the law, but the rate will be that which consumers choose by the degree to which they make it profitable to engage in the activity of producing progress. Courts have no criteria for establishing compromise deviations from consumer welfare here.¹²⁴

Oliver Williamson quickly pointed out that the Borkean perspective of allocative efficiency was static and ignored the nature of dynamic efficiency, through which innovation leads to cost reduction.¹²⁵ Williamson also stressed the value of "product variety," or product differentiation.¹²⁶ He argued that

¹²³ The pursuit of status and exclusivity tends to transform itself in many ways. From the social perspective, it is often desirable to allow sellers to charge high prices without wasting resources on bells and whistles. For status signaling through redundant costs, see, *e.g.*, Jane H. Pease, *A Note on Patterns of Conspicuous Consumption Among Seaboard Planters, 1820–1860*, 35 J. S. HIST. 381 (1969) (studying the accumulation of slaves to signal wealth during the pre-Antebellum era before the rise of brands); C. Arden Pope, III & H. L. Goodwin, Jr., *Impacts of Consumptive Demand on Rural Land Values*, 66 AM. J. AGRIC. ECON. 750, 750–51 (1984) (arguing that conspicuous consumption motivates some of the purchases of rural land in the United States); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006) (studying how real estate developers circumvent fair housing laws by embedding costly, demographically polarizing amenities within a new development and recording covenants mandating that all homeowners pay for those amenities.)

¹²⁴ Bork, *The Goals of Antitrust Policy*, *supra* note 2, at 251.

¹²⁵ Williamson, *Economies as an Antitrust Defense*, *supra* note 61, at 29–31; Williamson, *Allocative Efficiency and the Limits of Antitrust*, *supra* note 61, at 106–07, 115–16.

¹²⁶ Williamson, *Allocative Efficiency and the Limits of Antitrust*, *supra* note 125, at 116.

“‘[c]haracteristics,’ not goods give rise to utility. What needs to be evaluated in judging the social benefits of a good that offers a new combination of characteristics . . . is how it affects the efficiency frontier.”¹²⁷

Many courts expressly stated that antitrust laws intend to provide innovation, thereby implicitly rejecting the Borkean approach to dynamic efficiency in antitrust.¹²⁸ Consistent with this approach, the 1995 Antitrust Guidelines for the Licensing of Intellectual Property provide that “[t]he intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.”¹²⁹ Today, antitrust laws offer a platform for competition and innovation.¹³⁰

Bork believed that innovation “will occur even without special consideration by the law, but the rate will be that which consumers choose by the degree to which they make it profitable to engage in the activity of producing progress.”¹³¹ He was wrong in his assumptions about the markets for innovation and their potential vulnerability to market structure and other factors. Equally important, Bork was also wrong in believing that the consumer demand for innovation is necessarily rational.

Firms in markets for durable goods and fashion goods often must cannibalize past sales in order to generate revenues.¹³² They do so through

¹²⁷ *Id.*

¹²⁸ *See, e.g.,* Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) (“[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.”)

¹²⁹ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 1 (1995). The Guidelines further explain this statement:

The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.

¹³⁰ *See, e.g.,* HOVENKAMP, *supra* note 12, at 14 (“A restraint on innovation forces customers to accept an inferior good, service, or method of distribution when an unrestrained market might produce something better.”)

¹³¹ Bork, *The Goals of Antitrust Policy*, *supra* note 2, at 251.

¹³² *See, e.g.,* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics Of Fashion*, 61 STAN. L. REV. 1147 (2009); Barak Y. Orbach, *The Durapolist Puzzle: Monopoly Power in Durable-Goods Markets*, 21 YALE J. REG. 67 (2004). *See also* Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

innovation — the manufacturer “persuades” the consumer to replace an old product with a new one, thereby rendering the lifetime of the old product shorter than its actual useful lifetime. Annual style changes of automobiles and revised editions of textbooks are prime examples of this strategy.¹³³

Indeed, no more than minor improvements, style changes, fashions, and fads may be necessary to kill an old model and persuade consumers to switch to a new one. Product killing may be disguised as a stage in technological progress or an answer to consumers’ cry for new fashion.¹³⁴

The antitrust consumer-welfare paradigm must ignore reality to accommodate the frequent purchases of upgrades, gadgets, fashion items, and other things that signal innovation and style but mostly offer close to nothing new. Nevertheless, it is the consumer’s choice and it is as valid as his choice to invest in status goods.

III. POSSIBLE INTERPRETATIONS

Part II identified common circumstances in which consumer preferences and standard application of antitrust laws are likely to result in welfare losses, irrespective of the governing antitrust standard. This Part shows that the common interpretations that scholars offer for the consumer welfare standard are likely to result in welfare losses. Therefore, the term “consumer welfare” is poor and misleading.

A. Social Welfare

The antitrust methodology is all about partial equilibrium analysis isolates one sector of the economy from others and ignores possible interactions among sectors.¹³⁵ This general observation implies that certain restraints of trade may increase social welfare when competition and efficiency entail social costs, but

¹³³ See, e.g., CHARLES E. FERGUSON, MICROECONOMIC THEORY vii (rev. ed. 1969) (“Since everyone knows the basic reason for a revised edition is to kill off the existing used book market, it would be idle to suggest otherwise.”).

¹³⁴ See generally Wolfgang Pesendorfer, *Design Innovation and Fashion Cycles*, 85 AM. ECON. REV. 771 (1995) (showing that competition among designers may lead to less frequent changes in fashion and defining conditions under which consumers would be better off by banning the use of fashion); Georg Simmel, *Fashion*, 62 AM. J. SOC. 541, 544 (1957):

Fashion is merely a product of social demands, even though the individual object which it creates or recreates may represent a more or less individual need. This is clearly proved by the fact that very frequently not the slightest reason can be found for the creations of fashion from the standpoint of an objective, aesthetic, or other expediency.

¹³⁵ *Supra* notes 20-21 and accompanying text. See, e.g., Williamson, *Economies as an Antitrust Defense*, *supra* note 61, at 23-24 (discussing some of the implications of this point).

antitrust law is blind to these social welfare implications.¹³⁶ This is a well-known antitrust application of the theorem of second best.¹³⁷

Robert Bork acknowledged this point in *The Antitrust Paradox*, writing that “an expansion of output through increased efficiency would appear as pure gain in the consumer welfare model but might impose other welfare losses upon the society.”¹³⁸ He believed that this was “a problem whose solution lies with the legislature rather than with the judiciary. . . . A trade-off in values is required, and that is properly done by the legislature and reflected in specialized legislation. It cannot properly form the stuff of antitrust litigation.”¹³⁹ Bork could have generalized this point to a general approach of the theorem of second best, but instead he attacked the theorem in multiple unfocused directions.¹⁴⁰ Herbert Hovenkamp expressed a stronger opposition, noting that “[p]roblems of second-best may be so overwhelming and so hypothetical that the antitrust policymaker is well off to avoid them.”¹⁴¹

Antitrust laws indeed offer a limited set of policy tools that do not allow social welfare maximization, or even analysis of general welfare. Competition may promote welfare under many circumstances, but the antitrust enforcer does not examine the value of the market to society. It does not evaluate the question of whether we need abortions, alcohol, firearms, guns, junk food, plastic bags, pornography, and tobacco products. Put simply, “consumer welfare” literally does not mean “social welfare,” and the nature of antitrust analysis is not about social welfare.

¹³⁶ See generally Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849 (2000).

¹³⁷ R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 63 REV. ECON. STUD. 11, 11 (1956):

The general theorem for the second best optimum states that if there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions, the other Paretian conditions, although still attainable, are, in general, no longer desirable. In other words, given that one of the Paretian optimum conditions cannot be fulfilled, then an optimum situation can be achieved only by departing from all the other Paretian conditions.

Herbert Hovenkamp points out that the 1955 report of the Attorney General’s National Committee to Study the Antitrust Laws relied on the economist J. M. Clark, who advocated for some form of a practical “second best” approach for antitrust. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 221-22 (1985).

¹³⁸ BORK, *supra* note 6, at 114-15.

¹³⁹ *Id.*, at 115.

¹⁴⁰ *Id.*, at 113-14.

¹⁴¹ Hovenkamp, *Antitrust Policy After Chicago*, *supra* note 137, at 241.

B. Consumer Surplus

Since 1982, Robert Lande has been promoting the idea that antitrust laws are all about the promotion of consumer interest, either through consumer surplus maximization, or though what he argues is the ultimate goal of antitrust laws — “consumer choice.”¹⁴² According to Lande, the optimal level of consumer choice is “the state of affairs where the consumer has the power to define his or her own wants and the ability to satisfy these wants at competitive prices.”¹⁴³ This definition overlaps consumer surplus maximization, which Lande argues is the goal Congress had in mind when it enacted the Sherman Act.¹⁴⁴ It is broader than the “consumer surplus” concept in the sense that it may refer to various non-price product variables. In his works, Lande argues that “Congress implicitly declared that ‘consumers’ surplus’ was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers.”¹⁴⁵

Some courts’ statements may be read as endorsing this view.¹⁴⁶ However, since no court has ever analyzed the meaning of the term “consumer welfare” in antitrust law, such anecdotal supportive statements are as strong as judicial statement in favor of allocative efficiency or other views. Furthermore, it is doubtful that antitrust courts understand the conceptual differences between the terms “consumer welfare” and “consumer surplus.”¹⁴⁷ Therefore, the argument that when a court writes “consumer welfare” it means “consumer surplus” is not persuasive.

At the normative level, it is unclear whether antitrust laws should maximize consumer surplus. Oliver Williamson showed how certain mergers may

¹⁴² See, e.g., Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, *supra* note 10; Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997); Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007); Kirkwood & Lande, *supra* note 16.

¹⁴³ Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, *supra* note 142, at 503. Elsewhere, Lande provided a very similar definition: “It is the state of affairs in which the consumers are truly “sovereign,” in the sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services.” Averitt & Lande, *Consumer Sovereignty*, *id.*, at 715-16.

¹⁴⁴ Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, *supra* note 10.

¹⁴⁵ *Id.*, at 69.

¹⁴⁶ See, e.g., *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 715 (7th Cir. 2006) (“The principal purpose of the antitrust laws is to prevent overcharges to consumers.” (quoting *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 368 (7th Cir. 1987))).

¹⁴⁷ See *supra* Section I.A.

improve efficiency and result in smaller consumer surplus and yet would be socially beneficial.¹⁴⁸ Status goods provide an example in which maximization of consumer surplus may undermine markets. Markets for status goods often build on high prices, even though each consumer seeks low prices.¹⁴⁹ Most tying cases, if not all, involve a decision between groups that are likely to collect welfare gains from the tying and groups for which the tying entails welfare losses.¹⁵⁰ Furthermore, consumers' choices across product generations and fads may reflect their sovereignty, but from the economic perspective may keep them within the same product market. That is, consumer pay again and more to buy essentially a product they already own. When these choices respond to shrewd product design and pricing strategies, markets do not maximize consumer surplus, yet no antitrust law is violated.¹⁵¹

Thus, from a descriptive perspective, although “consumer surplus” may be a relative of “consumer welfare,” it is a different concept. If consumer surplus is the goal of antitrust laws, courts should be informed about it. From a normative perspective, there are many circumstances in which consumer surplus maximization is unlikely to serve society or even consumer preferences.

C. Total Surplus

Richard Posner argues that Kaldor-Hicks efficiency, or wealth maximization efficiency, is the only component of social welfare that “antitrust laws can do much to promote.”¹⁵² Because the antitrust methodology utilizes partial equilibrium analysis, many economists and economic oriented lawyers argue that the goal of antitrust laws should be maximization of the aggregate welfare in a market. That is, the sum of consumer surplus and producer surplus, irrespective of the distribution of surplus between these groups.¹⁵³ In recent

¹⁴⁸ Williamson, *Allocative Efficiency and the Limits of Antitrust*, *supra* note 61.

¹⁴⁹ *See supra* Section II.B.

¹⁵⁰ Herbert Hovenkamp illustrated this point using the facts of *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). Hovenkamp, *Distributive Justice and Antitrust Laws*, *supra* note 14, at 6-8. Louis Kaplow cleverly analogized tying arrangements to “a terrorist on the loose with one stick of dynamite.” There is always a decision which group would sustain more injuries. Louis Kaplow, *Extension of Monopoly Power through Leverage*, 85 COLUM. L. REV. 515, 516 (1985) (the analogy served the purpose of challenging the fixed-sum thesis in tying, which argues that a monopolist cannot leverage its market power through tying). *See generally* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

¹⁵¹ *See supra* Section II.C. For an analysis of such strategies, *see* Orbach, *The Durapolist Puzzle*, *supra* note 132, at 94-102.

¹⁵² POSNER, *supra* note 15, at 23.

¹⁵³ *See, e.g.*, Carlton, *supra* note 17, at 156-59 (“The fundamental reason is familiar to most economists: it is better to pursue public policies that maximize output and then worry about distributional questions, rather than to pursue inefficient policies.”); Farrell & Katz, *supra* note 17; Heyer, *supra* note 17; Weden, *supra* note 17; Williamson, *Economies as an Antitrust Defense*, *supra* note 61.

decades there are no attempts to persuade courts that antitrust laws have any goal other than “consumer welfare,” so the economists and lawyers in this group must believe that courts will expand (or already have expanded) the scope of the term to mean “total surplus.”

The major objection to the total surplus standard is its potential distributional effects. Consumer advocates believe that the standard undermines the consumer’s interests because Congress is unlikely to address distributional effects created through efficiency gains.

Considering the nature of antitrust methodology, the total surplus standard is probably the only standard that courts and agencies can consistently apply. But “consumer welfare” clearly does not mean “total surplus.”

CONCLUSION

Richard Posner and Herbert Hovenkamp, two great antitrust minds, noted that a good antitrust law could have prohibited unreasonable restraints on competition.¹⁵⁴ The present antitrust statutes are longer than this proposal and the courts apply them with the consumer welfare standard, which was born in sin and grew with illegitimate borrowing. Most antitrust lawyers and economists know that Robert Bork was wrong when he used the term “consumer welfare” in his analysis of the Sherman Act. The Supreme Court made a mistake in relying on his analysis. Over the years, dozens of articles and books have referred to Bork’s “confusion” and debated what meaning this mistaken labeling should have. The simple truth is that we, in the antitrust community, have failed to inform courts about the original mistake that Bork made. This Article aims to correct that mistake.

The methodology of antitrust law cannot maximize consumer welfare. It may maximize consumer surplus or total surplus. As the analysis shows, antitrust law will work better when it maximizes total surplus.¹⁵⁵

¹⁵⁴ See, e.g., HOVENKAMP, *supra* note 12, at 20-21 (“An antitrust statute that read simply, ‘unreasonable restraints on competition are hereby forbidden,’ would do all the work”); POSNER, *supra* note 15, at 260 (“An attractive alternative to . . . all . . . antitrust laws would . . . be a simple prohibition of unreasonably anticompetitive practices.”). Hovenkamp endorsed Posner’s note that appeared in the second edition of his ANTITRUST LAW book in 2001.

¹⁵⁵ The Antitrust Modernization Commission noted that “[a]ntitrust law prohibits anticompetitive conduct that harms consumer welfare.” ANTITRUST MODERNIZATION COMMISSION, *supra* note 15, at 3. The Commission, however, chose not to take a position as to the meaning of the term “consumer welfare.” *Id.*, at 26 note 22.