

HOW ANTITRUST LOST ITS GOAL

Barak Orbach*

“In the sea, once upon a time, O my Best Beloved, there was a Whale, and he ate fishes.”¹

During the first seven decades following the enactment of the Sherman Act, competition was the uncontroversial goal of antitrust. The introduction of the consumer welfare standard led to the dissipation of “competition” as the goal of U.S. competition laws. This Essay explores how antitrust lost the goal of competition and argues that this goal should be restored. The Essay reevaluates several influential antitrust propositions. First, while “consumer welfare” was offered as a remedy for reconciling contradictions and inconsistencies in antitrust, the adoption of the consumer welfare standard sparked an enduring controversy, causing confusion and doctrinal uncertainty. In effect, the consumer welfare standard established the greatest antitrust paradox yet. Second, the small-business interests hypothesis, which has often been used to explain the enactment of the Sherman Act, is inconsistent with the well-documented historical record. Third, the logic of Robert Bork’s consumer welfare thesis requires restoration of “competition” as the goal of antitrust. The Essay concludes with a straightforward observation: “consumer welfare” may continue serving as the stated goal of U.S. competition laws but, practically, antitrust has always been and will always be about the preservation of competition.

TABLE OF CONTENTS

INTRODUCTION.....	2254
I. LEGISLATIVE INTENT AND ECONOMIC UNDERSTANDING.....	2257
A. Who Drafted the Sherman Act?	2258
B. The State of Economic Thinking in 1890	2261
C. Under the Shadow of the Great Tariff Debates	2264
D. The Small-Business Interests Hypothesis	2267
II. THE TRANSITION FROM “COMPETITION” TO “CONSUMER WELFARE”	2268

* Professor of Law, the University of Arizona College of Law. www.orbach.org. I am grateful to Jon Baker, Harry First, Jack Kirkwood, Sivan Korn, Bob Lande, Alan Meese, George Priest, Steven Salop, Spencer Waller, and the participants at *The Goals of Antitrust* Symposium for their invaluable discussions and comments.

1. RUDYARD KIPLING, *How the Whale Got His Throat*, in JUST SO STORIES 1, 1 (1902).

A. <i>The Decline of Competition</i>	2269
B. <i>The Emergence of the Consumer Welfare Standard</i>	2272
CONCLUSION	2275

INTRODUCTION

U.S. competition laws are known as “antitrust” because they were designed as measures against the nineteenth-century trusts.² In 1979, quoting Robert Bork, the Supreme Court declared that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”³ Since then, “consumer welfare” has been the stated goal of U.S. competition laws.⁴

Federal antitrust statutes stress the significance of competition and appear to declare the preservation of competition as their goal. Section 1 of the Sherman Act prohibits agreements in “restraint of trade.”⁵ Section 2 of the Sherman Act outlaws monopolization—that is, exclusion of competition.⁶ Sections 2, 3, and 7 of the Clayton Act ban price discrimination, tying, and mergers that “may . . . substantially . . . lessen competition, or . . . tend to create a monopoly.”⁷ Section 5 of the Federal Trade Commission (FTC) Act prohibits “unfair methods of competition.”⁸ Indeed, antitrust inquiries have always focused on competitive effects, or at least this has been their perceived intent. Correspondingly, the preservation of competition in business has always served as the most intuitive and obvious goal of competition laws.⁹

Competition laws constitute one element of our regulatory system.¹⁰ What is the normative function of competition laws in this system? Could it be anything other than the preservation of competitive markets?

Competition, however, is *not* the stated goal of antitrust law. It is not even a meaningful contender as a potential goal in the debate over the goals studied by this Essay. This debate has focused on several standards: consumer welfare, total welfare, consumer surplus, total surplus, and consumer choice. Competition has been largely excluded from this list in

2. See generally Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

3. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)).

4. See generally Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

5. 15 U.S.C. § 1 (2006).

6. *Id.* § 2.

7. *Id.* § 18.

8. *Id.* § 45.

9. See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLES AND EXECUTION* 20 (2005) (“An antitrust statute that read[s] simply, ‘Unreasonable restraints on competition are hereby forbidden,’ would do all the work”); RICHARD A. POSNER, *ANTITRUST LAW* 260 (2d ed. 2001) (“An attractive alternative to . . . all . . . antitrust laws would . . . be a simple prohibition of unreasonably anticompetitive practices.”).

10. See generally BARAK ORBACH, *REGULATION: WHY AND HOW THE STATE REGULATES* (2012).

recent decades.¹¹ Prior to the mid-1960s, there were occasional intellectual inquiries into goals of antitrust. The broad understanding, however, had been that *competition was the original and practical goal of U.S. competition laws, that is, antitrust*. At some point in the late 1970s, antitrust lost the goal of competition.

How did antitrust lose the goal of competition? This Essay explores this question, and perhaps the more puzzling question of why the debate over the goals of antitrust has largely ignored competition as a plausible or even reasonable goal for U.S. competition laws. Finding that answer requires navigating through several logical glitches in the history of antitrust thinking. The starting point on this path is Robert Bork.

Robert Bork's *The Antitrust Paradox*¹² influenced U.S. competition laws in many ways, including framing the stated goal of antitrust. The Supreme Court endorsed the consumer welfare standard, relying on *The Antitrust Paradox*. For Bork, "consumer welfare" meant "allocative efficiency,"¹³ and "competition" meant "a shorthand expression for consumer welfare."¹⁴ Thus, he recommended, as a policy prescription, the term "consumer welfare" that allegedly "enables us to employ basic economic theory."¹⁵ "Consumer welfare," however, turned out to be an ambiguous and confusing term.¹⁶

The introduction of the consumer welfare standard sparked an enduring conceptual controversy in antitrust with broad doctrinal implications. While the term "consumer welfare" was offered to promote consistency and certainty in the application of antitrust laws, the underlying economic propositions of Bork's thesis were flawed, and the adoption of the term as the goal of antitrust resulted in an array of new inconsistencies. In the era of consumer welfare, many antitrust standards "sail on a sea of doubt,"¹⁷

11. To be sure, several antitrust scholars have argued that competition is or ought to be the goal of antitrust. The argument, however, has not played a significant role in the controversy. See, e.g., James M. Buchanan & Dwight R. Lee, *Private Interest Support for Efficiency Enhancing Antitrust Policies*, 30 ECON. INQUIRY 218 (1992); Gregory J. Werden, *Competition, Consumer Welfare & the Sherman Act*, 9 SEDONA CONF. J. 87 (2008). Alan Meese's discussion of "competition on the merits" in section 2 of the Sherman Act is essentially about the goals of antitrust. Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010); see also Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 78 ("Everyone knows that antitrust law should protect and further 'competition.'").

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

13. *Id.* at 98.

14. *Id.* at 61.

15. *Id.*

16. Antitrust economics does not accommodate welfare analysis, although it may accommodate surplus analysis. See generally Orbach, *supra* note 4.

17. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898) (warning that the "relaxation of the rules for determining the unreasonableness of restraints of trade," namely, the adoption of the rule of reason standard, was to "set sail on a sea of doubt"). For an expression of uncertainty in antitrust, see U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT vii (2008) ("Competition and consumers are best served if section 2 standards are

since the meaning of “consumer welfare” is ambiguous at best. No court has ever seriously addressed the meaning of the term.

The legislative history of the Sherman Act has been studied thoroughly during the past century. There is broad agreement today, if not consensus, that the record does *not* support the historical claims that led to the adoption of the consumer welfare standard. This Essay’s premise is that the historical record and the nature of the debate over the goals of antitrust are known. For simplicity, this Essay addresses only parts of the record needed to explore the role of competition as a goal of antitrust.

The inquiry in this Essay consists of two parts. Part I explains how Congress enacted competition without addressing the merit of competition. This part describes the simplistic economic understanding at the end of the nineteenth century, when “no trusts” meant “competition.” The rise and persistence of the consumer welfare standard illustrate why legislative intent may not be a desirable approach for modern law. But to the extent that any court will ever reconsider the legislative history of the Sherman Act, the Essay argues that, considering the common economic understanding in 1890, antitrust legislation effectively meant intent to preserve competition. In 1890, people distinguished between markets controlled by trusts and markets without restraints of trade (i.e., competition), where many sellers operate. Part II shows that competition was understood as the goal of antitrust until the introduction of the consumer welfare standard. It also presents the peculiar history of the consumer welfare standard in antitrust.

sound, clear, objective, effective, and administrable. After more than a century of evolution, section 2 standards have not entirely achieved these goals, and there has been a vigorous debate about the proper standards for evaluating unilateral conduct under section 2.”).



THE FOG

PUCK, November 22, 1911 (depicting the uncertainty that the Sherman Act created for businesses).

I. LEGISLATIVE INTENT AND ECONOMIC UNDERSTANDING

In his 1914 study of the Sherman Act, William Howard Taft argued that the “members of Congress who passed [the Sherman Act] made plain the object that they had in mind, and they used general expressions to accomplish it, which they thought had had definition in the existing law.”¹⁸ “The evil to be remedied was manifest,”¹⁹ and the confusion, Taft maintained, was created later when the statute became “a football of party politics” and “[p]oliticians . . . seized upon phrases that would attract the public eye, the meaning of which in the law they [did] not themselves underst[and].”²⁰ The confusion established by biased reconstruction of antitrust laws has indeed obscured the understanding of the goals of antitrust.

18. WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 6 (1914).

19. *Id.*

20. *Id.* at 5.



DOCTOR'S ORDERS.

PUCK, November 22, 1911 (the cover of the 1911 Thanksgiving Issue). A prescription from “Taft, M.D.” to the trusts—“You must go on a strict diet cut out all rich food”—deprives the trusts of the restraint-of-trade feast, leaving them with the thin soup of competition.²¹

A. Who Drafted the Sherman Act?

Under a certain statutory interpretation philosophy, which Robert Bork advanced, legislative intent can be inferred from the remote past and should direct courts today.²² Adhering to this philosophy, the Supreme Court

21. In 1911, the Taft Administration concluded two of the government’s most epic antitrust battles with the break of Standard Oil and the American Tobacco Company. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

22. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); see also Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL’Y 217, 223 (2010) (“Judge Bork’s attention to the original understanding of the Sherman Act and the Court’s embrace of that view brought order to antitrust law, and originalists have since applied that method to other areas of law.” (citation omitted));

adopted the consumer welfare standard as the goal of antitrust, believing that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”²³ Our inquiry begins with the plausibility of this belief.

Who drafted the Sherman Act? What was the legislative intent of the members of the 51st Congress that passed it? The enactment of the Sherman Act involved a lengthy, multiphase process. The individuals who secured its passage engaged in substantial committee work, delicate negotiations, the usual political deals and compromises, and inevitable political quarrels. The bill passed the Senate by a vote of 52 to 1, with 29 Senators absent.²⁴ It passed the House of Representatives by a vote of 242 to 0, with 85 members choosing not to vote.²⁵ The overwhelming public support for the anti-trust bill made voting against it a risky choice for politicians with aspirations for reelection.²⁶ It would be naïve to attribute a single intent to Congress in such a complex process.²⁷

Many scholars and courts have used the statements of Senator Sherman (R-Ohio) to interpret the Sherman Act. For example, in *United States v. Aluminum Co. of America*²⁸ (*Alcoa*), Judge Learned Hand attributed great significance to the fact that “[i]n the debates in Congress *Senator Sherman himself* . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.”²⁹ Similarly, Robert Bork insisted that “[Senator] Sherman was the prime mover in getting antitrust legislation considered and pressed through the Senate.”³⁰ Accordingly, Bork’s explicit research premise was that the “views of Senator Sherman . . . [were] crucial to an understanding of the intent underlying the law that bears his name.”³¹ But, as Hans Thorelli pointed out, “[t]hat *Sherman was*

Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1368 (1990) (“Bork fail[ed] to produce convincing *reasons* why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases.”).

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

24. 21 CONG. REC. 3153 (Apr. 8, 1890).

25. *Id.* at 6314.

26. Senator Rufus Blodgett (D-New Jersey), who voted against the bill, was not a candidate for reelection. During the debate over the Sherman Act he served as a railroad executive. See *Ex-Senator Blodgett Dead*, N.Y. TIMES, Oct. 4, 1910, at 11.

27. See *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 318 (1897) (“Looking simply at the history of the [Sherman] bill from the time it was introduced in the senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. . . . All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.”).

28. 148 F.2d 416 (2d Cir. 1945).

29. *Id.* at 428 (emphasis added).

30. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 14, 45–47 (1966).

31. *Id.* at 14. Bork acknowledged that the Judiciary Committee “completely rephrased” Sherman’s bill, but argued that “the final bill, in its substantive policy aspects, embodied Sherman’s views.” *Id.* at 14–15.

not the author of the act is clear to any intelligent reader of the Congressional Record.”³²

Although Senator Sherman introduced two antitrust bills and was a strong supporter of antitrust legislation, he was critical of the antitrust bill that bears his name. He barely voted for it. When the final bill was brought to the Senate for a vote, Senator Sherman stated:

I do not intend to open any debate on the subject, but I wish to state that, after having fairly and fully considered the amendment proposed by the Committee on the Judiciary, I shall vote for it, not as being precisely what I want, but as the best under all the circumstances that the Senate is prepared to give in this direction. Therefore, without enlarging or entering into debate, I shall vote for the proposition of the Judiciary Committee as it stands.³³

In 1890, it was transparent to the public that, while Senator Sherman introduced anti-trust bills,³⁴ the drafting of the final bill and the political persuasion were done by others. For example, after the Senate voted for the bill, *The Washington Post* wrote: “As the bill went to the Judiciary Committee it was a Sherman bill; as it came back from the Judiciary Committee it was principally an Edmunds bill.”³⁵ *The Washington Post* further explained Sherman’s ethical struggle: “The Ohio Senator accepted the situation with the best grace he could.”³⁶ Other newspapers printed a statement that Senator Sherman released in which he used much stronger language, denouncing the “substitute for the Sherman bill” and stating that it would be “totally ineffective in dealing with combinations and Trusts.”³⁷ Senator Sherman was so disappointed in the substitute for his bill that he stated that he was “giv[ing] up hope of seeing any legislation . . . [capable of coping] with the Trust evil.”³⁸

Senators George Edmunds (R-Vermont) and George Hoar (R-Massachusetts) were the principal drafters of the statute we know today as the Sherman Act.³⁹ The two were members of the Judiciary Committee that redrafted the anti-trust bill. Edmunds chaired the Committee. Other members of the Committee, such as Senator George Vest (D-Missouri), also contributed to the drafting and passage of the bill. Their statements are

32. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 211 (1954) (emphasis added).

33. 21 CONG. REC. 3145 (Apr. 8, 1890).

34. S. 1, 51st Cong. (1st Sess. 1889); S. 3445, 50th Cong. (1st Sess. 1888).

35. *The Anti-trust Bill*, WASH. POST, Apr. 10, 1890, at 4. Senator George Edmunds (R-Vermont) chaired the Judiciary Committee.

36. *Id.*

37. *Mr. Sherman Gives Up Hope*, N.Y. TIMES, Apr. 8, 1890, at 4 (quoting Senator Sherman).

38. *Id.* (quoting ST. LOUIS GLOBE DEMOCRAT).

39. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 94-95 (1965); Felix H. Levy, *The Federal Anti-trust Law and the “Rule of Reason,”* 1 VA. L. REV. 188, 188 (1913); see also *Mr. Sherman Gives Up Hope*, *supra* note 37.

consistent with Sherman's statements: They felt that it was odd that the celebrated statute was called the "Sherman Act."⁴⁰

Thus, although Senator Sherman earned historical credit for inspiring the congressional campaign that led to the enactment of the first federal antitrust statute, he did not draft the bill passed by Congress nor did he like it much.⁴¹ His views of competition laws cannot seriously be considered the "legislative intent" of the Sherman Act.

Nevertheless, many scholars and courts have used statements from the debate over Senator Sherman's bill—which Congress did not pass—to infer Congress's legislative intent in passing the Judiciary Committee's bill.⁴² Robert Bork was one of these scholars. He argued that the policy of the first bill "was carried forward into the Judiciary Committee's draft and enacted."⁴³ Senator Sherman and members of the Judiciary Committee clearly did not feel this way. Senator Sherman's perspective did not reflect the legislative intent of the Sherman Act.

Indeed, any "intelligent reader of the Congressional Record" ought to be aware of the discrepancy between the title of the Sherman Act and its history.⁴⁴ Many antitrust scholars and practitioners are familiar with this history.⁴⁵ The notion that one can extract from the Congressional Record "legislative intent" that has not been considered before is somewhat implausible. It was also implausible when the Supreme Court adopted the consumer welfare standard with no analysis, departing from the Court's long-established understanding of the goal of antitrust laws.

B. *The State of Economic Thinking in 1890*

Senator Sherman's anti-trust bills proposed that "all arrangements, contracts, agreements, trusts, or combinations . . . made with a view, or which tend, to prevent full and free competition . . . or . . . designed, or which tend to advance the cost to the consumer" would be void.⁴⁶ When the Judiciary Committee returned the revised bill on April 2, 1890, it no longer contained the word "competition."⁴⁷ By passing the Sherman Act, the 51st Congress enacted competition law without talking about

40. See, e.g., 36 CONG. REC. 522 (Jan. 6, 1903) (statement of Senator Hoar) ("It was so called . . . lucus a non lucendo, because Mr. Sherman had nothing to do with it whatever."); *id.* at 523 (statement of Senator Hoar) (a similar comment); 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 363 (1903) (discrediting Sherman's role in the drafting of the "1890 law" and ridiculing its common name); *Vest Talks on Tariff*, WASH. POST, Dec. 25, 1902, at 3 ("It is odd that the name of the late Senator Sherman should be coupled to a measure which he conspicuously opposed and refused to vote for.").

41. THORELLI, *supra* note 32, at 210–14.

42. For the conceptual flaws of this approach, see *id.* at 214–19.

43. Bork, *supra* note 30, at 45.

44. THORELLI, *supra* note 32, at 211.

45. In 1902, the U.S. Attorney-General Office published a book that organized and indexed the *Congressional Record*. U.S. ATTORNEY GENERAL, BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS (1902).

46. S. 1, 51st Cong. (1st Sess. 1889); S. 3445, 50th Cong. (2d Sess. 1888).

47. 21 CONG. REC. 2901 (Apr. 2, 1890).

competition.⁴⁸ The members of Congress undoubtedly intended to address the “trust problem,” but their lack of direct discussion of the merits of competition is puzzling.

Under public pressure, the 51st Congress debated anti-trust legislation. Many members of the Congress, although not all, were hostile to “trusts and combinations,” expressing determination to relieve the public from their burden. It is far from clear that all lawmakers fully understood the economic meaning of “anti-trust legislation.” At the time, the “trusts problem” generally meant restraints of trade, high prices, limited production, low wages, losses to small businesses, and other forms of *perceived* economic oppression. “No trusts” generally meant a state of competition, freedom from restraints of trade, low prices, better conditions of supply, and prosperity opportunities. “Competition” was an abstract concept that generally meant absence of restraints of trade.⁴⁹ For example, before the Senate voted on the Judiciary Committee’s bill, Senator Hoar stated: “The great thing that this bill does, except affording remedy, is to extend the common-law principles, *which protected fair competition in trade* in old times in England, to international and interstate commerce”⁵⁰

Senator Sherman, the drafters of the Sherman Act, and other lawmakers unequivocally expressed a desire to fight trusts and combinations through legislation.⁵¹ They were convinced that the United States would do better without them because of the belief that in a state of competition, where there are many businesses, prices are low and production is high. They did not question these premises and had no analytical tools to do so.⁵²

The economic thinking of the members of the 51st Congress was not far behind that of economists at the time. The concepts of “price,” “rent,” and

48. THORELLI, *supra* note 32, at 225–32.

49. See generally *id.*; Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989).

50. 21 CONG. REC. 3152 (Apr. 8, 1890) (statement of Senator Hoar) (emphasis added).

51. In his 1903 autobiography, Senator Hoar stated that the concern that motivated him in drafting the “law of 1890” was “the grave evil of the accumulation . . . of vast fortunes in single hands.” 2 HOAR, *supra* note 40, at 363. Hoar criticized the Supreme Court’s strict interpretation of section 1 of the Sherman Act, noting that the Judiciary Committee expected courts to treat the “words ‘agreements in restraint of trade’ as having a technical meaning, such as they [were] supposed to have in England.” *Id.* at 364; see also TAFT, *supra* note 18, at 2 (arguing that the enactment of the Sherman Act “was a step taken by Congress to meet what the public had found to be a growing and intolerable evil”). In 1890, Taft served as the U.S. Solicitor General. For a general analysis of the “trust problem,” see Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279 (2013).

52. At least formally, both the Democrats and Republicans denounced the trusts. In August 1888, a day after Senator Sherman introduced his first antitrust bill, James G. Blaine, a prominent Republican politician, criticized President Cleveland’s concerns regarding the “danger” of the trusts. Blaine ridiculed the Democrats’ approach to the trusts, stating that the trusts are “largely private affairs with which neither President Cleveland nor any private citizen has any particular right to interfere.” *Mr. Blaine’s Work Begun*, NY TIMES, Aug. 16, 1888, at 2. Blaine’s speech was shortly before the 1888 elections and drew a lot of negative publicity to which the Republican Party responded by a formal denouncement of the trusts.

“competition” were still in rudimentary form. Economists used and wrote about them but in an intuitive manner.⁵³

In 1898, Irving Fisher published the translation of Cournot’s celebrated work on the mathematical principles of economics.⁵⁴ Using Cournot’s simplistic framework, economists tied market shares to market power, developing formal explanations for monopolists’ power over prices.⁵⁵ This analytical framework was not available in 1890. Rather, when Congress debated the Sherman Act, economists sharply distinguished between trusts (monopoly) and competition.⁵⁶ Some prominent economists, like John Bates Clark, defended the trusts and monopolies, expressing confidence in the effectiveness of potential competition and other theories.⁵⁷ Overall, it is fair to state that, when Congress considered the Sherman Act, American economists mostly held an intuitive understanding that monopolies lead to high prices, while competition in the form of a marketplace with many sellers drives prices down.⁵⁸ With such intuitions, the protection of small

53. See, e.g., Frank T. Carlton, *Price and Rent*, 26 Q.J. ECON. 523 (1912); J.H. Hollander, *The Concept of Marginal Rent*, 9 Q.J. ECON. 175 (1895); John Ise, *Monopoly Elements in Rent*, 30 AM. ECON. REV. 33 (1940); C. W. MacFarlane, *Rent and Profit*, 5 ANNALS AM. ACAD. POL. & SOC. SCI. 90 (1894); Alfred Marshall, *On Rent*, 3 ECON. J. 74 (1893); see also LETWIN, *supra* note 39, at 71–77 (reviewing the dominant positions among American economists about competition, monopoly, and trust when the Sherman Act was enacted); George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1 (1957) (reviewing the history of the term “competition” and noting that it “entered economics from common discourse, and for long it connoted only the independent rivalry of two or more persons.”); Robert H. Wessel, *A Note on Economic Rent*, 57 AM. ECON. REV. 1221 (1967) (reviewing the confusion surrounding the concept of “economic rent”).

54. AUGUSTINE COURNOT, RECHERCHES SUR LES PRINCIPES MATHÉMATIQUES DE LA THÉORIE DES RICHESSES (1838); Irving Fisher, *Cournot and Mathematical Economics*, 12 Q.J. ECON. 119 (1898). Fisher’s wife’s brother-in-law translated the book. Fisher added notes to the publications. See Irving Fisher, *Cournot Forty Years Ago*, 6 ECONOMETRICA 198 (1938). In 1927, The MacMillan Company started publishing the translations and notes as a book that became very popular. See AUGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (Nathaniel T. Bacon trans., 1927); see also A.J. Nichol, *Tragedies in the Life of Cournot*, 6 ECONOMETRICA 193 (1938) (describing the delayed influence of Cournot).

55. See, e.g., Orbach & Rebling, *supra* note 2, at 633–39; Stigler, *supra* note 53, at 5–6.

56. See, e.g., Richard T. Ely, *Competition: Its Nature, Its Permanency, and Its Beneficence*, 2 PUB. AM. ECON. ASS’N 55 (1901) (addressing the meaning of “competition” as the President of the American Economic Association). In 1935, Frank Knight was still highly critical of the concept of competition, arguing that “[t]he critical reader of general economic literature must be struck by the absence of any attempt accurately to define that competition which is the principal subject under discussion.” FRANK HYNEMAN KNIGHT, *THE ETHICS OF COMPETITION* 41 (1935).

57. See, e.g., JOHN BATES CLARK, *THE CONTROL OF TRUSTS* v (1901); John Bates Clark, *Trusts*, 15 POL. SCI. Q. 181, 182 (1900); J.B. Clark, *The “Trust”: A New Agent for Doing an Old Work: Or Freedom Doing the Work of Monopoly*, 16 NEW ENGLANDER & YALE REV. 223 (1890). By 1914, Clark acknowledged that the “potentiality of unfair attacks by the trust tended to destroy the potentiality of competition.” JOHN BATES CLARK & JOHN MAURICE CLARK, *THE CONTROL OF TRUSTS* vii (rev. ed. 1914).

58. See Paul J. McNulty, *A Note on the History of Perfect Competition*, 75 J. POL. ECON. 395, 395 (1967); Mary S. Morgan, *Competing Notions of “Competition” in Late Nineteenth-Century American Economics*, 25 HIST. POL. ECON. 563 (1993).

businesses may seem to serve competition. Small businesses allegedly contributed to competition, as it was understood at the time.

Over the years, some commentators identified in the Congressional Record modern economic concepts that are too nuanced to be extracted from the abstract thinking of the late nineteenth century.⁵⁹ Most prominently, the consumer welfare standard emerged from such attribution of contemporary meaning to phrases that the members of Congress used while discussing the trust problem.⁶⁰

C. *Under the Shadow of the Great Tariff Debates*

The nineteenth century misunderstanding of basic economic principles cannot be overstated. Some context can illustrate why modern concepts and intuitions do not apply to the thinking of the members of the 51st Congress.

The first Sherman bill was introduced in the background of the “Great Tariff Debate of 1888”⁶¹ and was considered in the shadow of a heated controversy over tariff bills. The tariff debates stressed the rents that the nineteenth-century trusts extracted through protectionist policies that affected consumer prices and the cost of living as a whole. The tariff debates also highlighted the contrast between two concepts that were associated with the trusts—“free trade” with foreign nations that the trusts used political influence to stifle and “restraints of trade” that the trusts developed and preserved.

In the late 1880s, the pressing problem that troubled the United States was a growing fiscal surplus—national revenues exceeded expenditures by over 40 percent.⁶² Congress believed that changes to the tariff policy were necessary to address the problem. The Democrats proposed reductions in existing tariffs to foster competition, lower prices for consumers, and elimination of protectionism. The Republicans argued that tariff reductions

59. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257 (1989). For a general discussion of economic thinking in the second-half of the nineteenth century see SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865–1901* (1956).

60. See Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993); Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82–106 (1982) (explaining why the Congressional Record does not support the consumer welfare thesis).

61. Representative William Springer (D-Illinois), who chaired the Committee of the Whole, named the debate. 19 CONG. REC. 6519 (July 14, 1888) (statement of Rep. William Springer) (“This debate will perhaps be known as the most remarkable that ever occurred in our parliamentary history. It . . . shall be known as ‘The Great Tariff Debate of 1888.’”). This description of the Great Tariff Debate of 1888 draws from JOANNE REITANO, *THE TARIFF QUESTION IN THE GILDED AGE: THE GREAT DEBATE OF 1888* (1994); 2 EDWARD STANWOOD, *AMERICAN TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY* 192–295 (1903).

62. Douglas A. Irwin, *Higher Tariffs, Lower Revenues? Analyzing the Fiscal Aspects of “The Great Tariff Debate of 1888,”* 58 J. ECON. HIST. 59, 59 (1998).

would stimulate imports, thereby increasing government revenues, harming American industries, and adversely affecting local wages. The Republicans, therefore, proposed tariff increases to reduce government revenues and protect American industries from foreign competition.

In December 1887, President Grover Cleveland, a Democrat, delivered his third State of the Union Address (then called an “Annual Message”).⁶³ Cleveland dedicated his entire address to the tariff laws, which he described as a “vicious, inequitable, and illogical source of unnecessary taxation.”⁶⁴ The President further explained that the “primary and plain effect [of the tariff laws was to] raise the price to consumers” of all imported goods.⁶⁵ “[T]he increase of the cost of living,” he argued, “caused by such tariff becomes a burden upon those with moderate means and the poor, the employed and unemployed, the sick and well, and the young and old, and that it constitutes a tax.”⁶⁶ The President explained that competition among local producers sometimes had a positive effect on prices. He pointed out, however, that “it is notorious that this competition is too often strangled by combinations . . . frequently called trusts.”⁶⁷

President Cleveland’s address sparked the Great Tariff Debate of 1888. Congress spent much of 1888, until the presidential election, debating a tariff bill. Senator Sherman introduced his first anti-trust bill during this period.⁶⁸

The 1888 elections indeed focused on the tariff policy. The Democratic platform pledged tariff reductions,⁶⁹ arguing that “domestic industries and enterprises should not and need not be endangered by the reduction and correction of the burdens of taxation.”⁷⁰ The Democratic platform expressly argued that the high tariffs served the trusts at the expense of the public: “Judged by Democratic principles, the interests of the people are betrayed when, by unnecessary taxation, trusts and combinations are permitted to exist, which, while unduly enriching the few that combine, rob the body of our citizens by depriving them of the benefits of natural competition.”⁷¹

The platform of the Republican Party included an unequivocal pledge to protectionism: “We are uncompromisingly in favor of the American system of protection; we protest against its destruction as proposed by the President and his party. They serve the interests of Europe; we will support

63. President’s Annual Message, 19 CONG. REC. 9 (Dec. 6, 1887).

64. *Id.* at 10. It was the first time in U.S. history that the President devoted the State of the Union Address to a single topic. Stanwood, *supra* note 61, at 226.

65. President’s Annual Message, *supra* note 63.

66. *Id.*

67. *Id.*

68. S. 3445, 50th Cong. (2d Sess. 1888).

69. THOMAS HUDSON MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES: 1789 TO 1904, at 233, 235–36 (5th ed. 1904).

70. *Id.* at 235.

71. *Id.*

the interests of America.”⁷² Notably, at the same time, the Republican Party also denounced the trusts and declared unequivocal support for anti-trust legislation:

We declare our opposition to all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens; and we recommend to Congress and the state legislatures . . . such legislation as will prevent the execution of all schemes to oppress the people by undue charges on their supplies, or by unjust rates for the transportation of their products to market. We approve the legislation by Congress to prevent alike unjust burdens and unfair discriminations between the states.⁷³

In November 1888, U.S. voters elected the 51st Congress that passed the Sherman Act. The Republican Party scored a big victory, taking the White House and the two chambers of Congress. Much of the first session of the 51st Congress was dedicated to debates over the Tariff Act of 1890—the “McKinley Act,”⁷⁴ which was passed on October 1, 1890. Congress also debated and passed the Sherman Act during this period.⁷⁵ The McKinley Act substantially raised tariffs, but it did not accomplish the hoped-for result: revenues from imported goods that were subject to duties increased.⁷⁶

The Republican Party controlled the drafting and championed the passage of the Sherman Act. Its members saw no inconsistency between anti-trust legislation and protectionist policies that strengthened the trusts. They expressly dismissed the notion that pro-trust protectionism affected prices to the consumer.⁷⁷ Reflecting on the first years of the Sherman Act in 1903, Senator Hoar argued that there was “no time” to deliberate the Sherman Act because of the pressure “to get it through.”⁷⁸ Hoar acknowledged that the enactment of the statute required significant compromises, but stressed that a remedy for “evils from the trusts” was needed. He believed that this had “been accomplished.”⁷⁹

In sum, it may be fair to state that the members of the 51st Congress did not fully understand the significance of the Sherman Act, although they understood that its effects on trusts would be meaningful for the American economy, and they intended to serve the public—consumers and competitors of the trusts.

72. *Id.* at 240.

73. *Id.* at 241.

74. *See* ch. 1244, 26 Stat. 567 (1890).

75. *See* ch. 647, 26 Stat. 209 (1890).

76. Irwin, *supra* note 62, at 70.

77. Thomas Hazlett identified the inconsistency between the tariff policy and the antitrust legislation support for the position that “the Sherman Act was not part of generally pro-consumer campaign to remedy market power in the U.S. economy.” Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQ. 263, 273 (1992). Rather, he argued that it was a “political compromise” that “was not thought to do much more than codify and federalize the common law.” *Id.*

78. 2 HOAR, *supra* note 40, at 366.

79. *Id.*

D. The Small-Business Interests Hypothesis

During the past three decades, a line of influential academic publications has established a belief that Congress enacted the Sherman Act to serve the interests of small, less-efficient businesses that could not compete with the trusts.⁸⁰ Some of the most frequently cited works that allegedly support the argument make modest claims related to the potential role of interest groups in the political process but do not propose that the Sherman Act was enacted to serve small interest groups.⁸¹ The small-business interests hypothesis is no more plausible than the consumer welfare standard. It mostly builds on out-of-context quotes of lawmakers' concerns for competitors of the trusts.

Political debates are noisy, reflecting diverse interests and producing a wide range of allegations and statements.⁸² During the enactment of the Sherman Act, Congress expressly debated pro-trust protectionism. Proponents of pro-trust protectionism controlled Congress and, in fact, drafted the Sherman Act. The small-business interests hypothesis isolates certain statements and arguments made during these debates that *could* be interpreted as support for small-business protectionism. It is a simplistic hypothesis that reduces a complex political and economic history into a one-dimensional explanation.⁸³

In the late nineteenth century, politicians often considered harm to small businesses as an indication of the harm that the trusts inflicted on the economy. For example, Senator Hoar's speeches, letters, and autobiography reflect a strong conviction that the "grave evil of the accumulation . . . of vast fortunes in single hands" affected the American people and required remedy.⁸⁴ To illustrate this point, Senator Hoar wrote in his autobiography: "It is said that one man in this country has acquired a fortune of more than a thousand million dollars by getting an advantage over other producers or dealers"⁸⁵ Similarly, in one of the debates in the House of Representatives, Congressman William Mason charged that

80. See, e.g., Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73 (1985); Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQ. 242 (1992); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985); Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 REV. AUSTRIAN ECON. 275 (2002).

81. Most notably, George Stigler presented a simple quantitative study that offers "modest support for the view that the Sherman Act came from small business interests or that opposition came from areas with potential monopolizable industries, or both." Stigler, *supra* note 80, at 7. Stigler's findings are also consistent with the explanation that, in areas where the trusts were powerful, politicians were less likely to support antitrust legislation. His findings do not identify the nature of the political pressure.

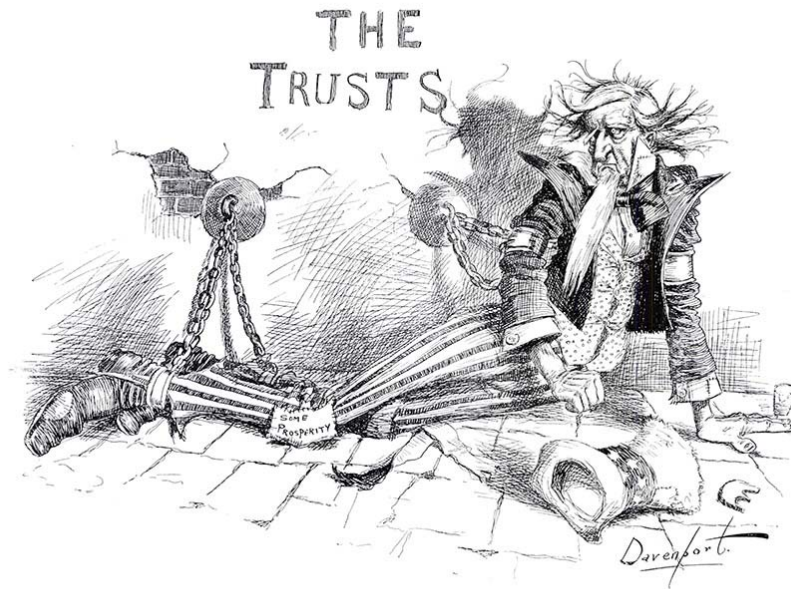
82. See generally Barak Orbach & Frances R. Sjöberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1 (2011).

83. It is only fair to note that the starting point of at least some of the papers that advanced this hypothesis was that "antitrust laws . . . often hinder rather than improve economic efficiency." DiLorenzo, *supra* note 80, at 73.

84. 2 HOAR, *supra* note 40, at 363.

85. *Id.*

the trusts had “destroyed legitimate [business] competition and [drove] honest men from legitimate business enterprises.”⁸⁶ But Hoar, Mason, and others did not enact the Sherman Act to serve the interest of small businesses. Rather, they believed that the trusts were “robbing” *all segments of society, including small businesses*.



How Long Can He Stand It?

Homer Davenport, 1890 (depicting the perceived effect of the trusts on national prosperity).

II. THE TRANSITION FROM “COMPETITION” TO “CONSUMER WELFARE”

In 1890, Congress passed a competition law without meaningfully talking about competition. In 1979, the Supreme Court revised the standard of competition regulation without talking about competition or the implications of the revision. Both transitions involved the use of popular phrases that, at the time, had significant political capital. In 1890, the phrase was “anti-trust,” and in 1979 it was “consumer welfare.” In 1979, per Robert Bork’s prescription, antitrust was reframed to resolve the confusion created by the word “competition” through the use of the phrase “consumer welfare.” Alas, the prescription’s underlying logic was circular, and its confusing consequences could have been anticipated.

86. 21 CONG. REC. 4100 (May 1, 1890) (statement of Rep. William Mason); DiLorenzo, *supra* note 80, at 80–81.

A. *The Decline of Competition*

The 1955 report of the Attorney General's National Committee to Study the Antitrust Laws opened with a simple statement: "The general objective of the antitrust laws is promotion of competition in open markets."⁸⁷ The Committee further stated that the antitrust legislation established a "policy 'against undue limitations on competitive conditions.'"⁸⁸ Indeed, until the introduction of the consumer welfare standard in the mid-1960s, the notion that competition was the goal of U.S. competition laws appeared to be uncontroversial.⁸⁹ Prominent antitrust thinkers, including Thurman Arnold,⁹⁰ Donald Dewey,⁹¹ Milton Handler,⁹² Richard Hofstadter,⁹³ Alfred Kahn,⁹⁴ Carl Kaysen, and Donald Turner,⁹⁵ described competition as the

87. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955).

88. *Id.* at 3 (emphasis omitted).

89. *See, e.g.,* Corwin D. Edwards, *Can Antitrust Laws Preserve Competition?*, 30 AM. ECON. REV. 164 (1940) (discussing the ability of antitrust laws to preserve competition).

90. Thurman Arnold, *The Economic Purpose of Antitrust Laws*, 26 MISS. L.J. 207 (1955).

91. Donald Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413, 414 (1964) ("[T]he whole history of antitrust policy can be read as the judicial quest for a working definition of competition.").

92. MILTON HANDLER, ANTITRUST IN PERSPECTIVE 3 (1957) ("The Sherman Law gave birth to no new principle. Congress merely affirmed its faith in competition as the principle regulating force in our economy."); TEMPORARY NAT'L ECON. COMM., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER 1 (1941) ("[By legislating the Sherman Act, Congress] sought to preserve competition from the extinction which threatened it.").

93. RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 195 (1965) (explaining the "idea of competition as a means of social regulation—as an economic, political, and moral force" that emerged in the late nineteenth century and stood behind the enactment of the Sherman Act).

94. *See, e.g.,* Alfred E. Kahn, *Market Power and Economic Growth: Guides to Public Policy*, 8 ANTITRUST BULL. 531 (1963).

95. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 18–19 (1959) ("If there has been any persistent policy and approach, it has been that of protecting competitive opportunities and competitive processes. . . . It is obvious that in passing the Sherman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'"); Donald Turner, *The American Antitrust Laws*, 18 MODERN L. REV. 244, 244 (1955) ("When the U.S. Congress passed . . . the Sherman Act—in 1890, American business became subject to a governmentally enforced policy of competition. Sixty-five years later, that Act is still the central core of American economic philosophy. . . . Protection of competition is the accepted policy."). Professor Turner noted:

Antitrust law is a pro-competition policy. . . . [T]he primary function of antitrust law is to protect and promote such procompetitive conduct, not to protect individual competitors as such.

The legislative history of the Sherman Act and other antitrust laws also suggests "populist" goals—social and political reasons for limiting business size and preserving large numbers of small businesses and business opportunities. . . . [I]t is questionable whether populist goals are appropriate factors to consider when formulating antitrust rules. The pursuit of these goals would broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.

unquestionable goal of antitrust. Antitrust courts also repeatedly referred to competition as the goal of U.S. competition laws.⁹⁶ The famous exception is Justice Oliver Wendell Holmes' dissent in *Northern Securities Co. v. United States*,⁹⁷ where he stated that the Sherman Act "says nothing about competition."⁹⁸ But Justice Holmes never "disguise[d] [his] belief that the Sherman Act [was] a humbug based on economic ignorance and incompetence."⁹⁹

In April 1978, a year before the Supreme Court adopted the consumer welfare standard, the Court handed down its decision in *National Society of Professional Engineers v. United States (NSPE)*.¹⁰⁰ The *NSPE* decision addressed the argument that "a learned profession" could impose restrictions on competition among its members "for the purpose of minimizing the risk that competition would produce inferior . . . work endangering the public safety."¹⁰¹ Writing for the Court, Justice John Paul Stevens dismissed the argument, stating that "the statutory policy precludes inquiry into the question whether competition is good or bad."¹⁰² He

Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987).

96. See, e.g., *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978) ("[By enacting the Sherman Act] Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country."); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962) ("[A]ntitrust laws . . . are intended primarily to preserve and stimulate competition."); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [T]he policy unequivocally laid down by the Act is competition."); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248–49 (1951) ("The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" (quoting *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 455 (7th Cir. 1943)); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) ("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."); *N. Sec. Co. v. United States*, 193 U.S. 197, 331 (1904) ("[T]he anti-trust act[] has prescribed the rule of free competition among those engaged in [interstate] commerce.") .

97. 193 U.S. 197 (1904).

98. *Id.* at 403 (Holmes, J., dissenting) (noting that "[t]he court below argued as if maintaining competition were the expressed object of the act").

99. Letter from Oliver Wendell Holmes, Justice, U.S. Supreme Court, to Sir Frederick Pollock (Apr. 23, 1910), reprinted in 1 HOLMES-POLLOCK LETTERS 163 (Mark DeWolfe Howe ed., 1942). In the early years of the Sherman Act, some judges insisted that it concerned only involuntary restrictions on individual liberty and said nothing about competition. See Hovenkamp, *supra* note 49, at 1032–33.

100. *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

101. *Id.* at 681.

102. *Id.* at 695.

explained that “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”¹⁰³ Justice Stevens went further, holding that, under antitrust law, competition analysis is narrow and does not include welfare effects. In his words:

In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.¹⁰⁴

Put simply, the *NSPE* Court indirectly, but quite explicitly, rejected the consumer welfare thesis. The *NSPE* Court, however, mostly stated the Supreme Court’s traditional understanding of antitrust. It did not offer any analysis of the goals.

The status of competition as the goal of antitrust faded until it vanished following the introduction of the consumer welfare standard. When Robert Bork launched his critique of antitrust in a 1963 essay with Ward Bowman, they depicted antitrust as a “*policy of preserving competition*.”¹⁰⁵ Bork and Bowman explained that “we want to preserve competition . . . [because it] provides society with the maximum output that can be achieved at any given time with the resources at its command.”¹⁰⁶ Bork and Bowman, therefore, considered competition to be the goal of antitrust.

The Bork-Bowman essay drew attention and criticism.¹⁰⁷ Defending their position and advancing his critique of antitrust, Robert Bork argued in a different article that he and Bowman were troubled by “two very different theories [in antitrust] of how competition may be injured.”¹⁰⁸ From that point, he developed the thesis that antitrust courts had been inconsistently using the concept of “competition,” frequently contradicting each other.

Summarizing his antitrust framework in the 1978 *Antitrust Paradox*, Bork dismissed the usefulness of the word “competition” in antitrust: “The fact that judges, like the rest of us, have used the word to mean very different things has resulted in the fruitless discourse of men talking past each other.”¹⁰⁹ He, therefore, concluded that “[p]art of the confusion about

103. *Id.*

104. *Id.* 695–96.

105. Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138, reprinted in 65 COLUM. L. REV. 363, 363 (1965) (emphasis added); see also Symposium, *Re-evaluation of the Impact of Present-Day Antitrust Policy on the Economy*, 23 A.B.A. ANTITRUST SECTION 288, 319–23 (1963) (Bork describing the role of competition in antitrust policy).

106. Bork & Bowman, *supra* note 105, at 365.

107. See, e.g., Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965).

108. Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401, 401 (1965).

109. BORK, *supra* note 12, at 58.

[the] goals [of antitrust] arises from the ambiguity of the word 'competition'"¹¹⁰ Phrased differently, Bork posited that the concept of "competition" is too ambiguous to be used as the goal of competition law. This proposition has been effectively governing antitrust law since 1979.

Frank Knight, one of the founders of the Chicago School of Economics, was a critic of the use of the word "competition" in economics and argued that the word lacked any clear definition.¹¹¹ Bork's critique of the word "competition" in antitrust is quite similar. Bork identified five meanings of the word "competition" that antitrust courts allegedly had been using: (1) the process of rivalry, (2) the absence of restraint over a person's economic activities by another person, (3) perfect competition as defined in economics, (4) "fragmented industries and markets," and (5) "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."¹¹² Bork concluded that we are "compelled" to accept the fifth meaning, finding that "[t]he legislative history of the Sherman Act . . . displays the clear and exclusive policy intention of promoting consumer welfare."¹¹³ The inevitable conclusion was that "competition" is "*a shorthand expression for consumer welfare*."¹¹⁴ Bork's claims sparked the controversy over the goals of antitrust law.

Legal rules, including precedents lag behind developments in economics (and other sciences). Observing this pattern in antitrust, but depicting it as an irresponsiveness of antitrust law to economics, Bork charged that "[t]he life of the antitrust law . . . [is] neither logic nor experience but bad economics and worse jurisprudence."¹¹⁵ Until the mid-1960s, antitrust jurisprudence was indeed deficient. But since the mid-1960s, the consumer welfare controversy has itself been an even greater impediment to the development of antitrust jurisprudence. This stated goal of antitrust—its core concept—is foreign to antitrust economics. Thus, Bork's own words offer a conclusion: "If I am correct, reform is needed, but it need not come from Congress. Antitrust policy is determined . . . by the Supreme Court."¹¹⁶ The Supreme Court should reconsider the consumer welfare standard it erroneously adopted.

B. The Emergence of the Consumer Welfare Standard

The phrase "consumer welfare" entered common use after the Great Depression. The frequency of its use in American publications fluctuated until the early 1970s and then skyrocketed with the social regulation

110. *Id.*

111. KNIGHT, *supra* note 56, at 41.

112. BORK, *supra* note 12, at 58–61 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)).

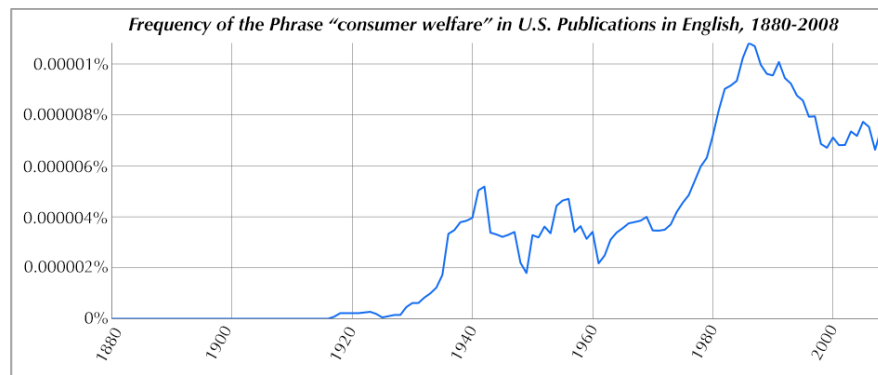
113. *Id.* at 61.

114. *Id.* (emphasis added).

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

116. *Id.*

revolution.¹¹⁷ Robert Bork introduced the consumer welfare thesis before the phrase “consumer welfare” acquired political significance in the United States. For Bork, the phrase “consumer welfare” meant “allocative efficiency.”¹¹⁸ A few years after Bork presented his thesis of the legislative intent of the Sherman Act, the phrase “consumer welfare” acquired a popular cultural meaning referring to the buyer’s well being: the benefits a buyer derives from the consumption of goods and services, or more casually, the individual’s well being.¹¹⁹ This meaning is not equivalent to allocative efficiency, of course.



Source: Google Ngram¹²⁰

In the mid-1970s, when the phrase “consumer welfare” was gaining popularity, Robert Bork served as the U.S. Solicitor General. In 1977, toward the end of his term, the Ninth Circuit, in *Boddicker v. Arizona State Dental Ass’n*,¹²¹ reasoned that serving the public is the goal of the Sherman Act.¹²² The court supported this claim with a footnote that stated: “In an exhaustive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded [that the] ‘legislative history [of the Sherman Act] contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.’”¹²³ In other words, the Ninth Circuit effectively equated Bork’s consumer welfare with the public welfare.

117. “Social regulation” addresses externalities, including aspects of antidiscrimination, consumer protection, workplace safety, and environmental preservation. See generally ORBACH, *supra* note 10, at 275–77. In 1970, Richard Posner published a paper about “antitrust policy and the consumer movement.” This paper echoed changes in the perceptions of “consumer welfare.” See Richard A. Posner, *Antitrust Policy and the Consumer Movement*, 15 ANTITRUST BULL. 361 (1970).

118. BORK, *supra* note 12, at 98.

119. See Orbach, *supra* note 4, at 137–42.

120. For the methodology and its limitations, see Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 SCIENCE 176 (2011).

121. 549 F.2d 626, 632 (9th Cir. 1977).

122. *Id.* at 632.

123. *Id.* at 632 n.10 (citing Bork, *supra* note 30, at 10).

By the end of the 1970s, the phrase “consumer welfare” had gained substantial political capital. In 1979, in *Reiter v. Sonotone*,¹²⁴ the Supreme Court examined the question of whether consumers who paid higher prices as a result of antitrust violations were injured within the meaning of section 4 of the Clayton Act. The Petitioners argued that consumers have standing under antitrust laws and can recover treble damages.¹²⁵ In support of their position they cited the footnote from the *Boddicker*.¹²⁶ The federal government filed an amicus brief in support of the Petitioners.¹²⁷ The government took the position that the “primary purpose of the Sherman Act was consumer protection.”¹²⁸ It supported this position with quotes from the Congressional Record that referred to consumers and prices. Concluding the argument, the government wrote that “[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription.”¹²⁹ The Supreme Court adopted the claim and declared: “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”¹³⁰

Frank Easterbrook, for whom *The Antitrust Paradox* was “a legal blueprint,”¹³¹ served as a Deputy Solicitor General and signed the government’s amicus brief as one of its authors.¹³² In his academic writing, Easterbrook argued that, “[h]owever you slice the legislative history, the dominant theme is the protection of consumers from overcharges.”¹³³ He believed that courts “should do their best to have a sensible, consistent program. That means a single goal, for a program,” and warned that “[g]oals based on something other than efficiency (or its close proxy consumers’ welfare) really call on judges to redistribute income.”¹³⁴ Notwithstanding, with this conceptual framework, Easterbrook also declared that “[t]he goal of antitrust is to perfect the operation of competitive markets.”¹³⁵

The record, therefore, shows that Bork’s incorrect equation of “consumer welfare” with “efficiency” and “competition” lies at the foundation of “consumer welfare” as the goal of antitrust. In *Reiter*, with no discussion,

124. 442 U.S. 300 (1979).

125. Brief for Petitioners, *Reiter*, 442 U.S. 330 (1979) (No. 78-690), 1979 WL 213491.

126. *Id.* at *13.

127. Brief for the United States As Amici Curiae Supporting Petitioners, *Reiter*, 442 U.S. 330 (1979) (No. 78-690), 1979 WL 213494 [hereinafter Brief for the United States].

128. *Id.* at *12.

129. *Id.* at *15 (citing BORK, *supra* note 12, at 66).

130. *Reiter*, 442 U.S. at 343 (citing BORK, *supra* note 12, at 66).

131. George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 9 (2009).

132. Brief for the United States, *supra* note 127, at *i. The petitioners cited a different sentence from Bork’s writing: “[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.” Brief for Petitioners, *supra* note 125, at *13 (citing Bork, *supra* note 30, at 10).

133. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986).

134. *Id.* at 1703–04.

135. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984).

the Supreme Court adopted “consumer welfare” as a new standard for regulation of competition, effectively replacing the original standard of “competition.”

Since *Reiter*, “consumer welfare” is the stated goal of the U.S. competition laws. What it means we do not know.¹³⁶ The phrase “consumer welfare” has mostly served as a source of debate among antitrust scholars but has no accepted meaning in antitrust. The history of the consumer welfare standard undermines its validity and its rationalization defies common sense.

CONCLUSION

The legislative intent of the Sherman Act does *not* support Bork’s consumer welfare thesis. Nevertheless, for more than three decades antitrust courts have been referring to “consumer welfare” as the original purpose of the Sherman Act and its present goal, while scholars have been debating the meaning of the phrase.

The origins of the consumer welfare standard are in the argument that the concept of “competition” is too confusing to serve as the goal of U.S. competition laws. This perceived confusion led to a convoluted set of propositions that resulted in “consumer welfare” as a policy prescription for antitrust because it “enables us to employ basic economic theory.”¹³⁷ The alleged rationale, like its underlying propositions, has no foundation in established economics. If anything, “consumer welfare” has been a source of confusion and controversy in antitrust. While offered as a remedy for reconciling confusion and contrasts in antitrust, the introduction of the consumer welfare standard effectively placed antitrust at war with itself.

In 1993, Robert Bork supplemented *The Antitrust Paradox*. He declared that the “crisis in antitrust” that inspired his original critique was over.¹³⁸ “[T]he paradox suggested by the book’s title,” which concerned antitrust’s inconsistent premises, “some of them leading to the preservation of competition and others to its suppression,”¹³⁹ was resolved in Bork’s mind. Bork also denounced “antitrust’s ideological drives.”¹⁴⁰ Summarizing the book’s key arguments, Bork wrote: “The argument of this book, of course, is that *competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency.*”¹⁴¹

Notwithstanding Bork’s many contributions to antitrust, the introduction of the “consumer welfare” standard as the goal of U.S. competition laws established the greatest antitrust paradox yet. Being vague and ambiguous,

136. See generally Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 *FORDHAM L. REV.* 2197 (2013); Orbach, *supra* note 4.

137. See *supra* note 15 and accompanying text.

138. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* ix (rev. ed. 1993).

139. *Id.*

140. *Id.* at x.

141. *Id.* at 427 (emphasis added).

the standard accommodates inconsistent premises and interpretations. Utilizing Bork's own analytical framework and arguments, the developments in antitrust during the past three decades require restoring "competition" as the goal of antitrust to resolve the most significant antitrust paradox today and promote clarity regarding the law.

The debate over the goals of antitrust has been misplaced.¹⁴² It is a debate about a meaning of a phrase that should have never been part of antitrust discourse. The regulation of competition cannot be expected to be simplistic and static. Rather, it ought to be nuanced, dynamic, and imperfect.¹⁴³ Like other economic concepts, the concept of "competition" develops over time.¹⁴⁴ When Bork described confusion in the perception of "competition" among courts, he compared perceptions in different eras¹⁴⁵ and demanded human judges to demonstrate the precision of a textbook. His critique of antitrust was not only imprecise, it has also hindered progress in antitrust.

In *United States v. Associated Press*,¹⁴⁶ Judge Learned Hand wrote: "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case."¹⁴⁷ The argument infuriated Bork, who found Hand's approach equivalent to "tennis with the net down."¹⁴⁸ But Judge Hand's practical approach should be reheard.

Antitrust should preserve some degree of flexibility in order to follow evolving understandings of economics. The controversy over the goals of antitrust illustrates why past views should be reconsidered. For example, in the course of the goals controversy, most scholars have probably used the word "welfare," although the antitrust methodology does not accommodate welfare analysis.¹⁴⁹ Many antitrust scholars equated consumer welfare and consumer surplus. And others argued that "consumer welfare" should mean "social surplus" (an odd interpretation in itself). The concept of surplus as a measure of economic welfare, however, has never been accepted in economics.¹⁵⁰ Surplus in antitrust analysis may be useful, but the notion

142. See Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157 (2013).

143. For a discussion on the complexity and imperfections in regulation, see Barak Orbach, *What Is Regulation?*, 30 YALE J. ON REG. ONLINE 1 (2012), http://yale-jreg.org/wp-content/uploads/2012/10/Orbach_30.pdf; Barak Orbach, *What Is Government Failure?*, 31 YALE J. ON REG. ONLINE (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219709.

144. See Hovenkamp, *supra* note 49.

145. In the epilogue of the revised edition, Bork argued that "courts assured us[that competition] meant the preservation or comfort of small businesses, the advancement of first amendment values, the preservation of political democracy, the preservation of local ownership, and so on ad infinitum." BORK, *supra* note 138, at 427.

146. 52 F. Supp. 362 (S.D.N.Y. 1943).

147. *Id.* at 370.

148. Bork, *supra* note 30, at 9–10.

149. See generally Meese, *supra* note 136; Orbach, *supra* note 4.

150. See, e.g., John M. Currie et al., *The Concept of Economic Surplus and Its Use in Economic Analysis*, 81 ECON. J. 741 (1971); Martin L. Weitzman, *Consumer's Surplus As an*

that a simplistic economic concept could define the goal of antitrust is somewhat extreme.

As Robert Bork pointed out, “[w]hen we talk of the desirability of competition we ordinarily have in mind . . . low prices, innovation, choice among differing products—all things we think of as being good for consumers.”¹⁵¹ During the first seven decades after the enactment of the Sherman Act, the preservation of competition was perceived as the most reasonable and practical end for antitrust. Competition is still the most reasonable and practical goal for competition laws. As a standard for competition laws, “competition” is not more confusing or abstract than “consumer welfare,” which has no particular meaning in antitrust. It is therefore only logical to restore antitrust’s lost goal. Whatever good ends the phrase “consumer welfare” may have once served, antitrust law should now lay it to rest. Of course, the consumer welfare standard may continue serving as the stated goal of U.S. competition laws but, practically, antitrust has always been and will always be about the preservation of competition.

Exact Approximation When Prices Are Appropriately Deflated, 103 Q.J. ECON. 543 (1988) (describing the conditions under which consumer surplus may be useful).

151. BORK, *supra* note 12, at 61.