THE ANTITRUST CONSUMER WELFARE PARADOX

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ABSTRACT
“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 has been instrumental to the implementation and enforcement of antitrust laws. Courts believe they understand this standard, although 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. This article shows that, when Bork used the term “consumer welfare,” he obscured basic concepts in economics. This article clarifies that the antitrust methodology permits only surplus analysis and does not accommodate welfare analysis. It explains the conceptual differences between the terms “surplus” and “welfare” and the relevant implications. This article further explains the differences between two other competing standards—“consumer surplus” and “total surplus”—that presently serve as proposed interpretations for the term “consumer welfare.” Each interpretation has some limitations and the necessary analytical progress calls first for conceptual clarity. This article argues that whatever good ends the “consumer welfare” phrase may have once served, antitrust law should now lay it to rest.

JEL: D60; K21; L40; L51

I. INTRODUCTION

All antitrust lawyers and economists know that the stated instrumental goal of antitrust laws is “consumer welfare,” which is a defined term in

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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 30 years later has no clear meaning. This 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. More importantly, the Article emphasizes a well-known point: the present antitrust methodology cannot accommodate welfare analysis and therefore the use of the term “welfare” is misleading.

In the 1960s, Robert Bork published a series of provocative articles in which he attacked the state of antitrust policy in the United States. Bork wrote at a time when much of the discussion of antitrust law reflected a preoccupation with protecting small businesses. He identified the weaknesses and flaws of this obsession with small businesses. Most notably, Bork 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.” To correct this chaos, Bork advanced a simple thesis, stating that “existing statutes can be legitimately interpreted only according to the canons of consumer welfare,” and stressed that “[c]onsumer welfare is the only legitimate goal of antitrust, not because antitrust is economics, but

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


3 See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962):

It is competition, not competitors, which the [Sherman] Act protects. But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.


5 Id.
because it is law."6 At the same time, economics lay in the background. In promoting “consumer welfare” as the object of antitrust law, Bork selected a phrase of great rhetorical power, because it combined popular appeal with a patina of economic erudition.

In 1978, Bork published his influential book, The Antitrust Paradox, which 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.”7 The answer that dictated the Borkean approach to antitrust was that Congress adopted the Sherman Act as a “consumer welfare prescription.”8

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.”9 Thus, to his approach, competition laws were all about consumer welfare maximization.

Bork is not a man of consensus.10 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.11 The Supreme Court, however, quickly adopted Bork’s “consumer welfare prescription,” making it the stated law of the land.12

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

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6 Id. at 244.
8 Id. at 66.
9 Id. at 51.
welfare should be the only goal of antitrust laws.”13 In the introductory chapter of the book, Hovenkamp stressed that the “only articulated goal of the antitrust laws is to benefit consumers.”14

The Antitrust Paradox ended the debate over the stated goals of antitrust law and opened a new debate over the meaning of the term “consumer welfare.” Antitrust scholars have known for many years that Bork was “confused” when he used the term “consumer welfare.” Yet, we have failed to inform courts who borrow from Bork’s terminology that they are relying on flawed analysis and misleading economic terminology.

Bork did a considerable service in challenging the protectionism of antitrust law. His terminological confusion would not have mattered if the question were simply one of playing word police and insisting that economic terms be used correctly. The larger problem is that the term “consumer welfare” can be used to promote ideas that have questionable economic merit, while dismissing the genuine economic objections to those ideas.

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.

Because this article examines the foundations of economic mislabeling, a statement of perspective is required upfront. Every printed work probably contains several mistakes and errors. The present article is no exception. The body of works of Robert Bork transformed antitrust law in many positive ways and for that Bork deserves a place of honor in the Antitrust Hall of Fame, once such an institution is established. Bork clarified that antitrust laws should promote efficiency, rather than protect inefficient small businesses. He popularized several basic economic principles and terms that are central to antitrust analysis. He is an antitrust giant.

This article deals with one particular term in the antitrust writing of Robert Bork that is important to the present antitrust analysis. The study of the emergence of the term is necessary to understand how to address an ongoing economic mistake of the jurisprudence. Sadly, this term, “consumer welfare,” is the most central term for antitrust analysis and its clarification is required.

Part II describes the rise of the phrase “consumer welfare” in antitrust law. Part III shows how the application of antitrust laws is likely to hurt consumer welfare in several sets of common circumstances. Part IV 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.

14 Id. at 2.
II. CONSUMER WELFARE IN ANTITRUST LAW

“Consumer welfare” is a defined term in economics, but in antitrust law it is still confused and debated. This inability of the jurisprudence to converge into one meaning for a core term is rather embarrassing because antitrust scholars and practitioners tend to brag that “antitrust law is a body of economically rational principles.” As this article shows, perhaps other than courts, 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,” and the other asserts that the appropriate meaning is “total surplus” or “aggregate welfare.”

In 1982, Herbert Hovenkamp already drew attention to the pointless nature of the consumer welfare standard in antitrust law.

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.


16 RICHARD A. POSNER, ANTITRUST LAW viii (2d ed. 2001); see also United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990) (“[L]ike all antitrust cases, this one must make economic sense.”); ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 3 (Apr. 2, 2007) (“[E]conomics now provides the core foundation for much of antitrust law.”).


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 Bork used it while referring to other economic concepts. The cause of the unreasonably long debate over antitrust standards is Bork’s successful campaign to persuade the antitrust world that antitrust laws are a “consumer welfare prescription,” when the term was undefined and when nobody, including Bork himself, believed that antitrust courts should protect consumer welfare as the term is defined in economics.

This Part starts with clarification of basic concepts in economics. Then, Part II.B briefly chronicles the mislabeling of consumer welfare in Bork’s writing. Part II.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. This analysis is focused on a subset of the economy, Analysis: Why Not the Best?, 2 COMPETITION POL’Y INT’L 29 (2006); Gregory J. Werden, Monopsony and the Sherman Act: Consumer Welfare in a New Light, 74 ANTITRUST L.J. 707 (2007).

20 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.”).

21 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 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.”).

22 For the Marshallian theory of equilibrium, see ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (1st ed.1890).
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, consumer welfare is equal to consumer surplus, 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 (shown in Figure 1) that is familiar to any person who took Econ 101 illustrates the Marshallian consumer surplus.

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 the 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. Many transactions can be reframed to present the seller as the buyer and vice versa. To illustrate this point, consider an insurance transaction. The insured parties purchase policies from insurers and sell the latter risks. We ordinarily think about them as buyers, but we could also think of them as sellers. For analytical convenience, we tend to classify one side of a transaction as the “consumer” and the other side as the “seller.”

23 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.”). 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).

24 For a 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 1 NEW PALGRAVE: A DICTIONARY OF ECONOMICS 606 (1987).

In his popular textbook, *Principles of Economics*, 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 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.

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; although conceptually it may maximize consumer surplus or total surplus, it cannot maximize consumer welfare as economists define the

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27 MANKIW, PRINCIPLES OF ECONOMICS, supra note 26, at 142.
term. Antitrust law does not even 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.\(^{28}\) Static efficiency is optimization of production within present technologies to minimize deadweight loss.\(^{29}\) 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.\(^{30}\) Dynamic efficiency means increases in resources through investments in education and research and development. Since the 1950s, it has been well established that dynamic efficiency is the major source of economic growth.\(^{31}\)

Bork connected most of these concepts to 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.”\(^{32}\) Knowledge and understanding of economic theory change over time. Economic beliefs transform as well. Bork made these conceptual links in one era. Today and for quite some time, such a proposition

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28 For an introductory discussion of these terms, see Louis M.B. Cabral, Introduction to Industrial Organization 26–28 (MIT Press 2000).


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.

30 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, James W. Brock & Normal P. Obst, Pareto Optimality and Antitrust Policy: The Old Chicago Policy and the New Learning, 58 S. Econ. J. 1 (1991).


32 BORK, supra note 7, at 91.
requires a robust economic model that to the best of my knowledge does not exist.

B. Bork’s Mislaveling (or Confusion)

In a successful crusade that made consumer welfare the instrumental goal of antitrust law in the United States, Bork blamed others for “bad economics and worse jurisprudence.” But Bork’s own study of the legislative intent of the Sherman Act has basic flaws as an economic analysis. His analysis does not support the conclusion that Congress passed the Sherman Act as a “consumer welfare prescription.”

Bork presented a detailed analysis of the legislative history of the Sherman Act. 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 too one-sided and misleading in the presentation of the facts. This point is outside the scope of this article. This article, however, does show that Bork was mistaken in creating connections among economic concepts.

I. 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. They introduced the American public to the unwritten views of Aaron Director of the University of Chicago Law School, who inspired a generation of great intellectuals.

33 See supra note 4 and accompanying text.
34 Bork, Legislative Intent and the Policy of the Sherman Act, supra note 2.
36 This article developed into a provocative dialogue with Harlan Blake and William Jones that was published by Fortune. Columbia Law Review reprinted the entire dialogue in 1965.
37 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 n.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 & Edward H. Levi, Law and the Future: Trade Regulation, 51 NW. U. L. REV. 281 (1956). For Aaron
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."\(^{38}\) The crisis was all about "[a]nti-free-market forces [that had] the upper hand and [were] steadily broadening and consolidating their victory."\(^{39}\) 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."\(^{40}\) Bork and Bowman, free-market advocates, explained why society must preserve competition:

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\text{[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.}\(^{41}\)
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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.

2. Bork’s Opening Salvo

In 1966, Robert Bork published his article *Legislative Intent and the Policy of the Sherman Act*.\(^{42}\) The purpose of the article was to glean the goal of the Sherman Act from its legislative history.

Bork concluded his investigation with the finding that "Congress intended the courts to implement . . . only that value we would today call consumer welfare,"\(^{43}\) and although "[t]he legislators did not . . . speak of consumer welfare with the precision of a modern economist, . . . their meaning was unmistakable."\(^{44}\) 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."\(^{45}\)

Despite these unequivocal statements, the facts that Bork presented had little to do with conventional economic definitions of consumer welfare.

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\(^{38}\) Bork & Bowman, *The Crisis in Antitrust*, supra note 2, at 138.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id. at 139.


\(^{43}\) Id.

\(^{44}\) Id. at 10.

\(^{45}\) Id.
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.” 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.” 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.” 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 to eliminate competition.” This outright prohibition, he argued, could be “explained only by a concern for consumer well-being.”

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.” Bork clarified that “[Senator John] Sherman employed these two criteria of illegality in every measure he presented to the Senate.” 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.” Bork did not bother to explain why Senator Sherman must have had consumer welfare policy in mind when he talked about “full and free competition” as a criterion distinctive from “cost to consumer.”

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

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46 Id. at 7.
47 Id.
48 Id. at 13 (emphasis added).
49 Id. at 11.
50 Id.
51 Id. at 15.
52 Id.
53 Id. at 16.
combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade.” Bork realized that this distinction was about efficiency and competition, yet he treated these values as mere proxies for consumer welfare.

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 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.

Bork not unreasonably concluded that the “emphasis in this passage is upon harm done to consumers.” But 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 interests, or at least that he could lose some capital if he does not make arguments in favor of consumers and individuals. This is exactly what Bork’s own “consumer welfare” rhetoric was doing. It is difficult to find a political text, even from the nineteenth century, and identify one single interest that its speaker intended to promote.

Bork argued 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.” Taking this view to the extreme may suggest that efficient mergers always benefit consumers. Senator Sherman, however, was skeptical of monopolistic mergers and believed that there are circumstances in which efficiency should be compromised to protect consumer interests:

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54 Id. at 36.
55 Id.
56 Id.
57 Id. at 25–26.
58 Id. at 26.
59 Id.
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.60

This was the only statement of Senator Sherman that Bork cited that clearly stresses consumer interests. Bork, however, believed that in this statement Senator Sherman was “not necessarily correct.”61 Bork was unwilling to consider the possibility that an efficient merger could harm consumers. 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.”62 Bork therefore attacked the ability to evaluate mergers, ex ante and ex post. In response to Bork’s writing, in 1968, Oliver Williamson showed in simple manner how efficient mergers may harm consumers.63

Bork reduced a very complex political process into one economic goal because he believed that the key to good policy is in the legislative intent. In itself, this pursuit is too simple: complex political processes require compromises among multiple groups that have various goals.64 Moreover, Bork used the term “consumer welfare” rather arbitrarily, with little attention to the standard economic definition of the term.

Competition, efficiency, wealth maximization, and consumer welfare are related concepts in microeconomic 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

60 Id. at 27.
61 Id. at 27 n.64.
62 Id.
64 For a more nuanced analysis of the legislative history of the Sherman Act, see LETWIN, supra note 35, at 53–99; THORELLI, supra note 35; DiLorenzo, supra note 35; Grandy, supra note 35; Hazlett, supra note 35; Stigler, supra note 35.
65 See supra notes 26–27 and accompanying text.
tobacco companies and competitiveness of markets are not related to consumer welfare. Low prices and more cigarettes can only harm consumers. Bork, however, believed that competition, efficiency, wealth maximization, and consumer welfare align in theory and practice. He was mistaken.

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, Bork published in the prestigious *American Economic Review* an essay that consolidated and clarified his views about the goals of antitrust law.

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 have its way." Bork, therefore, clearly defined consumer welfare as allocative efficiency, or more accurately, he 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." This logic was clearly popular at the time and during the Reagan Administration, but it never relied on solid foundations.

Bork believed that what he called the consumer welfare standard should have governed antitrust law also because of the judiciary's weakness. Twenty years before his failed nomination to the Supreme Court, Bork already disliked the "existence of an unelected, somewhat elitist, and undemocratic judicial institution." 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." What he implied, of course, was his own version of the consumer welfare standard.

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66 See supra Part II.A.
68 Id. at 242.
69 Id. at 245.
70 See supra note 21.
71 See supra Part II.
72 See supra note 10.
74 Id.
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 define by their expression of wants in the marketplace what things they regard as wealth.”

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

Conceptual confusions that 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. 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 trade-off model” that shows that a merger, which results in efficiencies and price increases, may be socially desirable, even though it may harm consumers. The qualifications of the model stressed several other fundamental flaws in Bork’s analysis. 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.”

In *The Antitrust Paradox*, Bork dedicated a chapter to respond to Williamson. His three major arguments were as follows: (1) we cannot possibly calculate the relevant values, and, therefore, Williamson’s model does not offer practical guidance; (2) in his opinion, economic analysis

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(“Professor Bork ... has argued that the legislative history of the Sherman Act warrants the conclusion that allocative efficiency was the sole concern of Congress.”); Williamson, *Allocative Efficiency and the Limits of Antitrust*, supra note 63, at 105 (stating that in his 1967 article, Bork “advanced what is essentially an allocative efficiency standard for antitrust”).

76 BORK, supra note 7, at 90.
77 Id.
78 See supra note 75.
80 Id. at 23–31.
81 Williamson did not refer to Senator Sherman in his article. For a discussion of this point, see supra notes 60–63 and accompanying text.
82 BORK, supra note 7, ch. 5.
83 Id. at 108. The 1992 Merger Guidelines acknowledge the value of merger-specific efficiencies and the difficulties associated with evaluating efficiencies. *See Dep’t of Justice*
would show that cost saving or social loss does not exist, and then the
decision would be easy; and (3) 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.
Putting aside the speculative nature of these arguments and their reliance
on rigid assumptions, the Borkean consumer welfare has never been any-
thing but some weak form of allocative efficiency. It was and still is a
misuse of term. Intentionally or not, Bork obfuscated basic concepts in
economics when he popularized consumer welfare as the prescription of
antitrust laws.

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, but the Court never addressed the meaning
of the term. In June 1979, the Supreme Court handed down Reiter v. Sonotone
Corp., citing Robert Bork as the authority for the statement that “Congress
designed the Sherman Act as a ‘consumer welfare prescription.’” 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.” 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, the Supreme Court endorsed again Bork’s conclusion that Congress enacted the Sherman Act as a “consumer welfare prescription.” The Court 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.” In this statement, the Court essentially held that antitrust law does not permit promoting efficiency while sacrificing consumer interests. The context of the decision was the legality of contractual arrangements, but the logic could supposedly apply to mergers as well. This argument has been rather controversial at least since Oliver Williamson published his 1968 “naive tradeoff model,” which shows that a merger that results in efficiencies and price increases may be socially desirable.

In Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. and Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., two decisions that involved unsuccessful predation schemes, the Supreme Court distinguished between consumer welfare and total welfare and clarified, again, that the standard in antitrust law is consumer welfare. The Court emphasized that, although unsuccessful predation may be socially undesirable, it is a “boon to consumers” and therefore legal under antitrust laws. In these two decisions, the Supreme Court filled the consumer welfare standard with a clear consumer-oriented meaning. Thus, the Court appears to believe that the “consumer welfare” standard is about consumers, rather than about efficiency.

91 Nat’l Collegiate Athletic Ass’n, 468 U.S. at 85.
92 Id. at 107 (citing Reiter, 442 U.S. at 343).
93 Id.
94 Williamson, Economies as an Antitrust Defense, supra note 63.
97 Predation strategies are pricing or other business schemes in which a business incurs short-term losses with prospects to exclude competition, recover these losses, and make profits 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 eliminates competitors that cannot match its prices. Later, the business raises prices and makes a 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.
99 In Blue Shield of Virginia v. McCready, 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.” Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (quoting 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.
D. Borkean Reflections

In 1993, Bork published a revised edition of *The Antitrust Paradox* that included a new introduction and epilogue. In the new introduction, Bork expressed great satisfaction with the developments in antitrust since the 1978 publication of his book. Specifically, he noted: “[A]ntitrust has downsized. It is merely law, not a farrago of amorphous and leftist political and sociological propositions.”\(^{100}\)

Like others, Bork attributed the changes in the field to the rise of the Chicago School of Antitrust.\(^{101}\) He argued that the two primary characteristics of the Chicago schools were “the insistence that the exclusive goal of antitrust adjudication is...the maximization of consumer welfare”\(^{102}\) and applying “economic analysis...to understand the impact of business behavior on consumer welfare.”\(^{103}\)

In the 1993 epilogue, Bork observed that, “with some ambiguity at times, [courts] have adopted a consumer welfare model.”\(^{104}\) He remained firm in his view that “consumer welfare” means “economic efficiency...to make us as wealthy as possible.”\(^{105}\) Bork further stressed that “[t]he distribution of that wealth or the accomplishment of noneconomic goals are the proper subjects of other laws.”\(^{106}\) He remained convinced in the correctness of his terminology.

III. CAN ANTITRUST HARM CONSUMER WELFARE?

The consumer welfare paradox describes the phenomenon in which, under present interpretations of the term “consumer welfare,” the application of antitrust laws may sometimes harm consumers and reduce total social welfare. This Part examines three sets of circumstances in which the combination of conventional applications 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. More precisely, ordinary applications of the consumer


\(^{101}\) Id. at xi; see also Posner, supra note 37.

\(^{102}\) BORK, supra note 100, at xi.

\(^{103}\) Id.

\(^{104}\) Id. at 427.

\(^{105}\) Id.

\(^{106}\) Id.
welfare standard may result in consumer welfare losses, irrespective of the applied interpretation.

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 to allow consumers to consume more.\textsuperscript{107} For example, in Atlantic Richfield v. USA Petroleum Co.,\textsuperscript{108} 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.”\textsuperscript{109}

The consumption of the vast majority of products indeed tends to benefit consumers up to a 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.\textsuperscript{110} In modern society, tobacco products perhaps remain as the last legal bads: there is scientific consensus that tobacco products harm users.\textsuperscript{111} 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 consumers 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 always 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.\textsuperscript{112}

\textsuperscript{107} See, e.g., HOVENKAMP, supra note 13, 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.”).


\textsuperscript{109} Id. at 340.

\textsuperscript{110} 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, 1912–46 (1997).

\textsuperscript{111} 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).

The tobacco industry has generated many interesting antitrust cases, but the most famous recent one is *Brooke Group*. 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” and distinguished between condemned predatory pricing that “poses a dangerous probability of actual monopolization” and “[unsuccessful] predatory pricing [that] produces lower aggregate prices in the market, and [enhances] consumer welfare.” 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.”

Thus, for goods or bads, antitrust laws appear to welcome low prices regardless of the actual impact on consumer welfare. 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 the consumer is related to the 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. However, the appeal of certain products is in the exclusive status that

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115 *Id.* at 222 (citation omitted).

116 *Id.* at 224.

117 *Id.*

118 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 FTC expressed formal opposition to this exemption. *See Prepared Statement by Chairman Robert Pitofsky before Subcomm. on Antitrust, Business Rights and Competition Comm. on the Judiciary, United States Senate on the Proposed Tobacco Settlement* (Oct. 29, 1997).

their high prices confer.120 Exclusivity of status goods is a defined product feature, just like reliability of news, age of red wine, and accuracy of clocks.121 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.122


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 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.


The world of collectibles offers an illustration for products that certain consumers want less when prices go down. 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 Hibel Corporation,123 a manufacturer of artwork collectibles. Sheltering behind the Colgate doctrine,124 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.125

In Leegin Creative Leather Products., Inc. v. PSKS, Inc.,126 the landmark case in which the Supreme Court overruled the 96-year-old per se ban on resale price maintenance,127 a fashion-goods manufacturer adopted resale price maintenance among other reasons because of the concern that discounts harmed its products “brand image and reputation.”128 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.129

Put simply, the premise “paying less is always better” is correct in the sense that all individuals prefer to pay the lowest possible prices available for any particular good. Some consumers, however, are willing to pay premium prices for certain branded goods, as long as these premiums buy them exclusivity and status. For their own reasons, these consumers desire to belong to

123 Winn v. Edna Hibel Corp., 858 F.2d 1517 (11th Cir. 1988).
124 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 Products., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
125 Winn, 858 F.2d at 1518.
126 Leegin Creative Leather Prods., 551 U.S. at 877.
127 Resale price maintenance is the practice whereby a manufacturer sets pricing rules for retailers.
128 Leegin Creative Leather Prods., 551 U.S. at 883.
129 See Orbach, Antitrust Vertical Myopia, supra note 122; Orbach, The Image Theory, supra note 122.
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.

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.\(^\text{130}\) 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.\(^\text{131}\)

\(^{130}\) 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, for example, 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).

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. Williamson also stressed the value of “product variety,” or product differentiation. He argued that “‘[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.”

Many courts expressly stated that antitrust laws intend to provide innovation, thereby implicitly rejecting the Borkean approach to dynamic efficiency in antitrust. 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.” Today, antitrust laws offer a platform for competition and innovation.

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.” This belief was a derivative of several simplistic assumptions about market structure, firm conduct, and the nature of innovation. Today, we know that legal regimes affect innovation and that the rate of innovation is affected by many variables and strategic decisions. Consumer

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134 Id.
135 See, e.g., Atari Games Corp. v. Nintendo of Am., 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.”).
136 U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTI trust 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.

137 See, e.g., *HOVENKAMP*, supra note 13, 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.”).
choices and preferences constitute only one subset of variables in this vector. Thus, like many other thinkers of the time, Bork underestimated the significance of law to innovation and overestimated the significance of consumer preferences.

In practice, in markets for “innovations,” the way creative firms utilize consumer preferences is not necessarily beneficial to consumers, although often it is. Firms in markets for durable goods and fashion goods often must cannibalize past sales to generate revenues. They do so through 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.

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.

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.

IV. POSSIBLE INTERPRETATIONS

Part III 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.


140 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.”).

141 See, e.g., 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.”).
A. Consumer or Social Welfare

The antitrust methodology, which is all about partial equilibrium analysis, isolates one sector of the economy from others and ignores possible interactions among sectors.142 This general observation implies that certain restraints of trade may increase social welfare when competition and efficiency entail social costs, but antitrust law is blind to these social welfare implications.143 This is a well-known antitrust application of the theorem of second best.144

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.”145 He argued 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 special legislation. It cannot properly form the stuff of antitrust litigation.”146 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.147 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.”148

The antitrust methodology indeed offers a limited set of policy tools that do not accommodate welfare maximization or even welfare analysis. Conceptually, it may be desirable to have a different methodology, but this will entail a massive statutory reform and training of antitrust professionals. The use of the word “welfare” in antitrust is inconsistent with its methodology.

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142 See, e.g., Williamson, Economies as an Antitrust Defense, supra note 63, at 23–24 (discussing some of the implications of this point).

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 Pareto conditions, the other Pareto conditions, although still attainable, are, in general, no longer desirable. In other words, given that one of the Pareto optimum conditions cannot be fulfilled, then an optimum situation can be achieved only by departing from all the other Pareto conditions.

145 BORK, supra note 7, at 114–15.
146 Id. at 115.
147 Id. at 113–14.
148 Hovenkamp, supra note 144, at 241.
Competition may promote welfare under many circumstances, but the antitrust enforcer does not examine the value of the market to society or the particular welfare circumstances. The antitrust enforcer does not evaluate the question of whether we need abortions, alcohol, firearms, guns, junk food, plastic bags, pornography, or tobacco products. Because the enforcer does not examine this preliminary question about controversial products and services, it also does not evaluate the question of whether their level of use affects their value to society.

Thus, because the antitrust methodology cannot accommodate welfare analysis, using goals that suggest that antitrust somehow engages in direct welfare optimization is confusing and misleading. The phrase “consumer welfare” is such an example.

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 through what he argues is the ultimate goal of antitrust laws—“consumer choice.” 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.” This definition partially overlaps with consumer surplus maximization, which Lande argues is the goal Congress had in mind when it enacted the Sherman Act. 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.”


150 Lande, Consumer Choice as the Ultimate Goal of Antitrust, supra note 149, 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, supra note 149, at 715–16.

151 Lande, supra note 11.

152 Id. at 69.
Some courts’ statements may be read as endorsing this view. However, because no court has ever analyzed the meaning of the term “consumer welfare” in antitrust law, such anecdotal supportive statements are as strong as judicial statements 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.” Therefore, the argument that when a court writes “consumer welfare” it means “consumer surplus” is not persuasive.

The consumer surplus standard is consistent with the antitrust methodology in the sense that it is a surplus-based criterion that partial equilibrium analyses can accommodate. Its availability does not necessarily mean that it is the best standard.

At the normative level, it is unclear whether antitrust laws should maximize consumer surplus. Oliver Williamson showed how certain mergers may improve efficiency and result in smaller consumer surplus and yet would be socially beneficial. 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. 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. 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, consumers 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.

Thus, from a descriptive perspective, although “consumer surplus” may be a relative of “consumer welfare,” it is a different concept. If consumer

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153 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))).

154 See supra Part I.A.

155 Williamson, Allocative Efficiency and the Limits of Antitrust, supra note 63.

156 See supra Part II.B.


158 See supra Part II.C. For an analysis of such strategies, see Orbach, The Durapolist Puzzle, supra note 139, at 94–102.
surplus is the goal of antitrust laws, courts should be informed about it. From a normative perspective, there are at least several common categories of circumstances in which consumer surplus maximization is unlikely to serve consumer preferences and social interests.

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.”\(^{159}\) Because the antitrust methodology utilizes partial equilibrium analysis, many economists and 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.\(^{160}\)

In recent 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.” In practice, probably very few judges have appreciation of the subtleties of the various interpretations that the consumer welfare standard may accommodate.

As a surplus criterion, as opposed to welfare optimization, the total surplus standard is consistent with the antitrust methodology. There may be practical reasons to prefer the total surplus standard over the consumer surplus standard, because the former does not share some of the limitations of the latter. 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. For many decades, the antitrust rhetoric has been utilizing the phrase “consumer harm,” which instructs analysis and may have distributional effects. This suggests that the antitrust evolution cannot offer ideal conceptual consistency with present terminology, although at the very least it appears that the term “consumer welfare” has too many meanings and is confusing and undesirable.

V. CONCLUSION

Richard Posner and Herbert Hovenkamp, two great antitrust minds, noted that a good antitrust law could have consisted of one legal rule: a prohibition

\(^{159}\) POSNER, supra note 16, at 23.

\(^{160}\) See, e.g., Carlton, supra note 19, 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 19; Heyer, supra note 19; Weden, supra note 19; Williamson, Economies as an Antitrust Defense, supra note 63.
against unreasonable restraints on competition.\(^{161}\) Over the years, the Supreme Court has provided statements that are supposedly consistent with this spirit.\(^{162}\) The weight of these statements is probably as good as the weight of other statements that are consistent with the rise of the consumer welfare standard. Despite the age of the discipline and its intellectual capacity, certain domains in the antitrust methodology have been neglected to accommodate conservative and liberal ideologies. Specifically, despite the general consensus over a competition regime, the controversy over the goals of antitrust laws has never settled, although it transformed itself into a controversy over the meaning of the term “consumer welfare.”

The term “consumer” is conceptually confusing in various contexts. In many transactions, the identity of the parties as “consumers” is arbitrary and subject to social traditions and marketing strategies.\(^{163}\) We normally identify “buyers” as “consumers,” but in monopsonistic markets, most would identify the sellers as consumers.\(^{164}\) In other instances, such as insurance transactions and content industries, the classification of parties as “consumers” (or “buyers”) is mostly a matter of tradition. The individuals who are ordinarily regarded as “consumers” (or “buyers”) function as sellers, trading risks with insurers and attention with advertisers. Thus, the conceptual starting point of the stated goal of antitrust laws is somewhat ill-defined. The “consumer welfare” goal has never had a defined consumer to maximize her welfare.

More importantly, the antitrust consumer welfare standard was born in a rhetorical flourish and grew with illegitimate borrowing. Most antitrust lawyers and economists know that Bork was confused 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 mislabeling.

Because the goal of antitrust law is instrumental to the operation of the field, its mislabeling is socially costly in many ways. Many generations of law students learn about one standard and their professors rarely have the time

\(^{161}\) See, e.g., HOVENKAMP, supra note 13, at 20–21 (“An antitrust statute that read[s] simply, ‘unreasonable restraints on competition are hereby forbidden,’ would do all the work”); POSNER, supra note 16, 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 2001 book, Antitrust Law.


\(^{163}\) See supra note 25 and accompanying text.

to elaborate on the relevant nuances. Many practicing lawyers and judges are unfamiliar with the known mislabeling and apply or debate a standard that is inconsistent with the antitrust methodology. From the practical point of view, a clarification of the standard could reduce the cost of antitrust litigation and merger review. The differences between the total surplus standard and consumer-oriented standards are substantial and could affect the outcomes of merger reviews.

The methodology of antitrust law cannot maximize consumer welfare. It may maximize consumer surplus or total surplus. Each standard has its own limitations and the jurisprudence is locked in a path dependent on conceptual and terminological inconsistencies that impede progress toward one of the standards for antitrust law in every context, or a more nuanced law that will have different standards for different contexts.

Bork’s rhetorical masterstroke is now an impediment to this progress. The phrase “consumer welfare” is confusing when the goal is all about surplus. Whatever good ends the phrase may have once served, antitrust law should now lay it to rest.

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165 The Antitrust Modernization Commission noted that “[a]ntitrust law prohibits anticompetitive conduct that harms consumer welfare.” ANTITRUST MODERNIZATION COMM’N, supra note 16, at 3. The Commission, however, chose not to take a position as to the meaning of the term “consumer welfare.” Id. at 26 n.22.