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American Gothic: How Chicago Economics Distorts "Consumer Welfare" in Antitrust

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ABSTRACT

Since the publication of Robert Bork's *The Antitrust Paradox*, lawyers, judges, and many economists have defended "Consumer welfare" (CW) as a standard for decisions about antitrust goals and enforcement priorities. This paper argues that the CW is actually an empty concept and is an inappropriate goal for antitrust. Welfare economists concede that there is no credible measurable link between price and output and human well-being. This means that the concept of CW does not legitimate limited antitrust enforcement, nor does it justify the exclusion of other antitrust goals that require more active enforcement practices. This paper contends that antitrust policy is not welfare based at all, and that if it were, antitrust policy and enforcement would differ significantly from the Chicago School vision. Without the fiction that economists can establish that in the short run lower price and higher output measurably increases welfare more than other goals, recent defenses of the CW standard resolve down to arguments based on unsupported assumptions.

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Serious thinking about antitrust goals has been in a deep freeze since the Reagan Revolution. For the last 40 years, the Chicago School's limited antitrust approach based on the Consumer Welfare ("CW") standard has dominated the antitrust policy debate. Now, suddenly, winds of change are blowing. The "New Brandeis School" seeks to replace questionable Chicago School assumptions in order to reshape and renovate antitrust enforcement in the United States. As prominent neo-Brandeisian Lina Khan describes, "Sometimes called the New Brandeis School, this group signals a break with the Chicago School, whose ideas set antitrust on a radically new course starting in the 1970s and 1980s and continue to underpin competition policy in the USA today." [1] In an earlier paper published in the Antitrust Bulletin, I defended the New Brandeis project by showing that CW is not an operational concept.[2] From its inception, welfare economists and the founders of welfare economic theory acknowledged that economic performance could not be linked to measures of human well-being, or welfare, in a rigorous way. As a result, when output increases, or prices fall, one cannot conclude much, if anything, about the impact on human well-

[1] Lina Khan, "*The New Brandeis Movement: America's Antimonopoly Debate*," 9 J. OF EURO. COMP. LAW 131, 132 (2018) ("The Chicago School focus on 'consumer welfare' … has warped American's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers. The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs – all harms that Congress intended for the antitrust laws to prevent."); Marshall Steinbaum and Maurice Stucke, "*The Effective Competition Standard: A New Standard for Antitrust*," ROOSEVELT INSTITUTE (2018) at 1 ("This market power imbalance is due, in large part, to lax antitrust law and enforcement. The Federal Trade Commission and Department of Justice are intended to monitor and prevent monopolies with market power from forming 'in their incipiency'. But of late, they have failed. This is due to the consumer welfare standard, which identifies and judges harm to competition only by its potential effects on consumers-and rarely with respect to anything other than prices"); *See also*, Lina Khan and Sandeep Vaheesan, "*Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*," 11 HARVARD LAW & POLICY REV. 235, 237 (2017); Daniel Crane "*Antitrust's Unconventional Politics*," VIRGINIA L. R. ONLINE, forthcoming at 8; TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 88, 135 (2018).
[2] Mark Glick, "*The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*," 63 ANTITRUST BULL. 455 (2018).

being. Only in a situation where there are no losers can we reliably conclude that welfare has increased, and even in that case, it is not possible to prove that a welfare increase is more than trivial. In any case, antitrust enforcement never involves unanimous agreement between the parties, which is what would be required to eliminate any losers.

This paper carries the argument a step further, by showing that the concept of CW cannot reliably guide policy, and that antitrust practice in fact does not employ a concept of welfare. Antitrust law instead developed, and proceeds, based on non-welfare considerations. However, since Judge Robert Bork's introduction of the CW goal into antitrust, the economics field has made great strides in the understanding of human well-being. Applying this new evidence suggests that the goals advanced by the New Brandeis School would have a greater welfare increasing impact than the Chicago School approach. Once the veil of assumptions behind the concept of CW is lifted, recent defenses of the CW standard boil down to an appeal for limited antitrust activity without any principled basis. There is no theoretical or empirical research in economics that compels the restriction of antitrust enforcement as advocated by defenders of CW. Accordingly, antitrust policy should be based on empirical analysis and historical fact, not ideology or fear of disrupting existing orthodoxy.

I. The Founders of the Theory of Economic Welfare and Leading Theorists in the Economic Welfare Field Recognized the Limitations of Economic Welfare and these Limitations Make Welfare Theory Inapplicable to Antitrust Applications.

In an earlier paper, I retraced how leading theorists in welfare economics concluded that economists cannot render policy guidance on welfare grounds without employing heroic and unreliable assumptions.[3] The term "welfare" in economic theory refers to the quality of individual lives as subjectively experienced by the individuals themselves. The measure of the quality, or

[3] Mark Glick, "*The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*," 63 ANTITRUST BULL. 455 (2018).

satisfaction or happiness of an individual life is called "utility."[4] There are several theories of economic welfare, including consumers' surplus, Pareto optimality, and growth of GDP (output or wealth increases).[5] Each of these theories spawned a long history of debate in economics, and this literature reveals that none of these approaches are applicable to antitrust analysis.

The consumers' surplus approach typically provides the economic narrative for the CW standard. Alfred Marshall introduced this view in his famous *Principles of Economics* text.[6] To develop this approach, Marshall assumed that utility was cardinal and observable. Cardinal utility means that the well-being that a consumer obtains from consumption can be measured on a real number scale, such as in dollars. Economists have long recognized that cardinal utility is a fiction.[7] Nevertheless, the assumption of cardinal units is necessary because market level analysis requires adding individual utility. Only then can one obtain a market demand curve that would remain linked to utility.[8] Because consumers' surplus must adopt this unsubstantiated assumption to analyze market transactions, it forfeits any hope of establishing a reliable and plausible link between market prices and human well-being or welfare. Indeed, at the time Marshall introduced the theory of consumers' surplus, most economists rejected it because of the cardinal utility assumption. This led to a consensus among economists that welfare analysis had to be restricted

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[4] I discuss the ambiguities in the concept of utility in Mark Glick, "*The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust,*" 63 ANTITRUST BULL. 455 (2018) at ____.
[5] Mark Glick, "*The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*," 63 ANTITRUST BULL. 455, 485-487 (2018).
[6] ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 103 (8th Ed. 2009).
[7] MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 344-347 (describing the rejection of cardinal utility).
[8] MICHAEL MANDLER, DILEMMAS IN ECONOMIC THEORY, PERSISTING FOUNDATIONAL PROBLEMS OF MICROECONOMICS 114 (1999) ("The inability to go beyond non-controversial interpersonal comparisons of welfare has remained a constant of neoclassical welfare economics"). Ruth Weinstein, "*Do Utility Comparisons Pose a Problem?*" 92 PHIL. STUD. 307, 318 (1998) ("the structure that preferences have does not lend itself to non-arbitrary comparisons between individuals.").

to Pareto efficiency in which welfare improvements are only assumed when some economic agents gain without harm to others.[9]

Unfortunately, the Pareto criteria is not applicable to antitrust analysis because there are always losers when the antitrust laws are enforced. In the 1930s John Hicks and Nicholas Kaldor attempted to revive the theory of consumers' surplus by use of the Kaldor-Hicks compensation principle.[10] However, Samuelson and Gorman subsequently demonstrated that the principle lacked consistency.[11] Their critiques have been confirmed by several modern welfare economists.[12]

Finally, CW is sometimes described as increases in wealth or income. This is also fallacious. Arthur Pigou demonstrated that increased GDP or wealth is not necessarily coextensive with increased welfare because of distribution effects, and no economic work has subsequently undermined Pigou's conclusions.[13]

Part of the confusion economists impose on antitrust lawyers is caused by economic textbook writers. Introductory economics textbooks have taken a schizophrenic approach to the concept of economic welfare. These textbooks present the theory of consumers' surplus when

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[9] Gregory Werden, "*Antitrust's Rule of Reason: Only Competition Matters*," 2 (DOJ WORKING PAPER 2013) ("To formalize such ideas, economists struggled in vain to sum utilities of all individuals in the economy. Economists then turned to the concept of Pareto optimality.").

[10] John Hicks, "*The Rehabilitation of Consumers' Surplus*," 8 REV. OF ECON STUD. 108 (1940-1941); Nicolas Kaldor, "*Welfare Propositions of Economics and Interpersonal Comparisons of Utility*," 49 ECON. J. 549 (1939).

[11] Paul Samuelson, "*Evaluation of Real Income*," 2 OXFORD ECON. PAPERS 1 (1950); W. M. Gorman, "*Community Preference Fields*," 21 ECONOMETRIA 63 (1953).

[12] John Chipman & James Moore, "*The New Welfare Economics, 1939-1974*," 19 INT. ECON. REV. 547, 548 (1978) ("the New Welfare Economics must be considered a failure"); E. MISHAN, INTRODUCTION TO NORMATIVE ECONOMICS 368 (1981) (the "criteria based on compensation tests have turned out to be untrustworthy, indeed misleading").

[13] ARTHUR PIGOU, THE ECONOMICS OF WELFARE (1920); John Chipman & James Moore, "*Why an Increase in GNP Need Not Imply an Improvement in Potential Welfare*," 29 KYKLOS 391 (1976).

introducing the theory of demand, but do not alert introductory economic students to the flawed assumptions that undergird the concept. Then, only in more advanced texts, are the troublesome assumptions discussed.[14] It has been the unfortunate practice of antitrust economists to present only the introductory text approach to lawyers. This omission has led to the uncritical application of these concepts to policy because lawyers assume that they have been vetted for reliability. As Frank Ackerman observed: "there is a growing disconnect between advanced academic and pedestrian policy-oriented styles of economics. Understanding public policy debates therefore requires looking back into the origins of the field."[15]

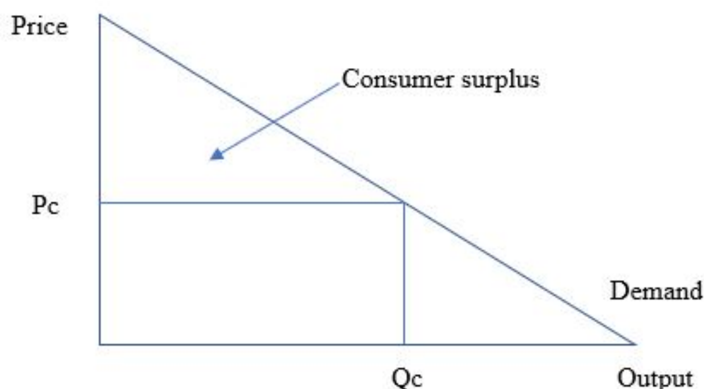
A. Consumer Welfare as Consumers' Surplus

The typical procedure for introducing the concept of CW to antitrust practitioners in antitrust basics or foundational seminars is to associate CW with the concept of consumers' surplus. The following is a standard graph used to illustrate the concept.

[14] Compare WILLIAM BAUMOL, ALAN BLINDER and JOHN SOLOW, MICROECONOMICS: PRINCIPLES AND POLICY 94-96 (2016); with ANDREU MAS-COLELL, MICHAEL WHINSTON AND JERRY GREEN, MICROECONOMIC THEORY 9, 50, 598-606 (1995).

[15] FRANK ACKERMAN, WORST CASE ECONOMICS 5 (2017).

A Competitive Market



On the horizontal axis in Figure 1 is output, and on the vertical axis is price. The downward sloping demand curve represents the relationship between price and the quantity of output consumers will demand in this market. Assume that the market consists of two sellers and two buyers/consumers. The market in Figure 1 is also assumed to be competitive, so the market price is equal to marginal cost. The area under the demand curve but above the competitive price is called the consumers' surplus. The term "surplus" is applied because each point on the demand curve represents a price that some consumers are willing (and able) to pay (called the reservation price) and the amount of output they are willing to buy. However, while these consumers are willing to pay the price identified on the demand curve, they only must pay the competitive price. The difference between the reservation price and the prevailing price is the consumers' surplus. This difference, summed over each unit of output sold, yields the total consumers' surplus in the market.

An extension of this concept defines the situation of maximum consumers' surplus as "efficient." It is important to notice that in this approach a lower price and higher output are the

means to an end, not the objective itself. Higher output and lower price expand consumers' surplus, which measures the utility the consumer expects to receive from consuming the purchased goods and services over and above the utility represented by the price paid for that consumption. This is consistent with the goal of economic theory, which is to increase welfare or utility, not output. Consequently, a situation of maximum utility, given the available resources, is one definition of efficiency.

While consumers' surplus is a measure of utility, the units of measure in Figure 1 are dollars.[16] To measure utility in dollars we need to first assume that it is possible to measure utility in cardinal units, because money is cardinal. Second, we need to assume that consumers reveal the amount of utility that they expect to obtain from the purchase of the goods and services by the amount of money they are willing to pay. Both assumptions are necessary to transform utility into dollars. The first assumption requires the ability to observe cardinal utility, which as discussed above, economists themselves eschew. The second assumption is also not true, even in the marginalist framing of utility. An additional dollar to a low-income worker generates more utility than an additional dollar to a billionaire.[17] Without these assumptions the link between market demand and utility is broken. A lower price may increase welfare, or it may not, and the amounts at issue may be significant or immaterial. Thus, it is improper to assume that lower price and

[16] This is often a point of confusion. For example, Barak Orbach states that "antitrust methodology permits only surplus analysis and does not accommodate welfare analysis." Barak Orbach, "*The Antitrust Consumer Welfare Paradox*," 7 J. OF COMP. LAW & ECON. 133 (2010). He has in mind products like cigarettes where a lower price increases consumer's surplus but reduces health which he associates with welfare. But consumers' surplus is measured in units of utility expressed in money. When he argues that consumers do not choose what increases their welfare he is only pointing out the disconnect between observed choice and utility.

[17] Joe Farrell & Michael Katz, "*The Economics of Welfare Standards in Antitrust*" (COMPETITION POLICY CENTER, UN. CAL. BERKELEY, 2006) at 9 ("It is however, a widely held view that a dollar is worth more to society in the hands of a poorer person than those of a rich one.").

higher output should automatically receive any heightened standing as policy goals based on welfare analysis, because the welfare increase is a result of the theory's assumptions not some objectively measurable reality, and a consensus of economists find these assumptions unreliable and unsupported.

Because the concept of CW is vacuous, it is not surprising that there is little agreement on its meaning or application in antitrust. Marshall Steinbaum and Maurice Stucke document the disparate understanding of consumer welfare among the world's antitrust enforcement agencies.

> *For example, 30 of 33 countries in a 2007 survey by the International Competition Network (ICN) identified consumer welfare as an antitrust objective. But most agencies did 'not specifically define consumer welfare and appear[ed] to have different economic understandings of the term…Similarly, a 2011 ICN survey, although finding 'some agreement' among the 57 surveyed competition authorities, identified significant differences. Only 7 of the 57 authorities agreed with the provided definition of consumer welfare. Most (38) of the antitrust authorities had 'no explicit definition' of consumer welfare.*[18]

Curiously, this lack of content is often turned into a virtue by CW defenders asserting that the CW standard is "flexible," meaning that it can include various goals or standards. Daniel Crane makes this point:

> *As the 2010 Horizontal Merger Guidelines make clear, generic principles of antitrust analysis are often expressed in price terms 'for simplicity of exposition' but all other factors affecting consumer welfare including 'product quality, reduced product variety, reduced service, or diminished innovation' should also be taken into effect. If current antitrust analysis is focused on static efficiency, there is nothing within the frame of the consumer welfare standard that prevents pushing it in the direction of dynamic efficiency or some other aspect of consumer value.*[19]

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[18] Marshall Steinbaum and Maurice Stucke, "*The Effective Competition Standard: A New Standard for Antitrust*," ROOSEVELT INSTITUTE, September 2018.
[19] Daniel Crane, "*Four Questions for the Neo-Brandeisians*," 1 ANTITRUST CHRONICLE 63 (2018).

The Department of Justice and Federal Trade Commission 2010 Horizontal Merger Guidelines ("Merger Guidelines") include, as some of the goals of its merger enforcement, preventing transactions that raise price, reduce product quality, reduce product variety, reduce service, or diminish innovation.[20] Presumably, they believe that each one of these goals increases CW. For example, innovation might result in future lower prices and increased product quality which could result in an increase in market demand. However, examples like this can be generated without limit. Higher wages can also benefit consumers through many mechanisms that result in greater demand and more consumers' surplus. Macroeconomic stability could result in fewer recessions and more consumers' surplus. With a little ingenuity, virtually any competitive goal could be ensconced by the CW standard.[21] Because under CW everything can be defended, nothing can.

B. The Williamson Trade-Off.

Another indefensible feature of CW theory is illustrated by the so-called Williamson Tradeoff. Assume that the two firms in the example from Figure 1 merge to form a monopoly. If the new monopoly price and output are overlaid on Figure 1, we obtain Figure 2 below. Figure 2 can be used to illustrate the Williamson Tradeoff used by Judge Bork to demonstrate the use of the CW approach in Chapter 5 of The Antitrust Paradox.

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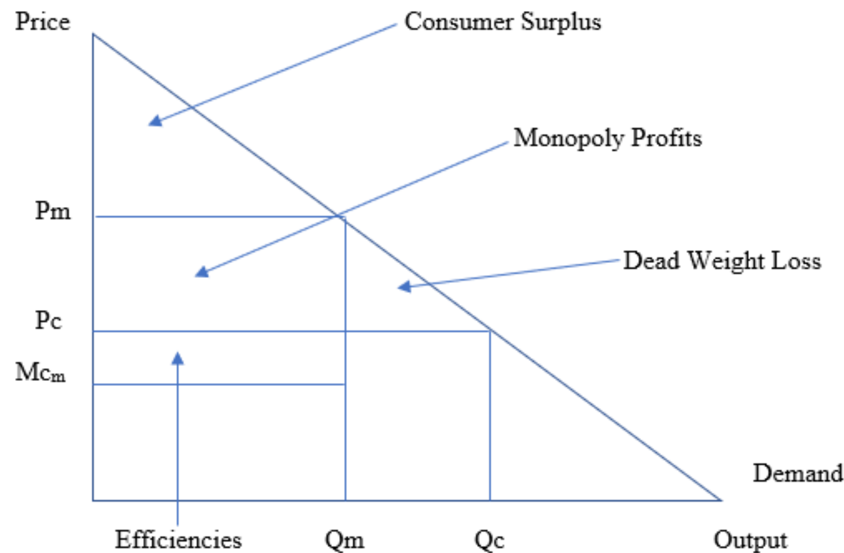
[20] Merger Guidelines at 2.

[21] A. Douglas Melamed & Nicolas Petit argue that the consumer welfare standard can include all the New Brandeis School criticisms of the tech platforms and monopsony in labor markets. A. Douglas Melamed & Nicolas Petit, "*The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets,*" 54 REV. OF IND. ORG. 741 (2019).



The monopolist in Figure 2 maximizes profits by reducing output and raising price. It is evident from the figure that the monopoly price, Pm, is above the competitive price, Pc. In addition, output has been reduced from the competitive quantity Qc to Qm. The reduced quantity and higher prices result in less consumers' surplus than under competitive conditions. This is because some of the consumers' surplus has been transferred to the monopolist as economic profits, and part of the consumers' surplus is simply lost as fewer transactions take place. The portion of the consumers' surplus that is lost is referred to as the dead weight loss. Dead weight loss is associated with the units of output for which social demand exceeds the social costs, yet the output is not produced.

But, there is no agreement concerning the relevance of these categories for antitrust policy. Judge Bork argued that the hypothetical merger in Figure 2 would only be anticompetitive if the

deadweight loss exceeded the efficiencies.[22] In contrast, Robert Lande contended that what was most important was the income transfer from the consumers to the monopolist.[23] Judge Posner argued that the income transfer is a cost, so the proper analysis is to compare the deadweight loss + the monopoly profits against the efficiencies.[24] As noted by the Antitrust Modernization Commission's Report and Recommendations, "Debate continues about the precise definition of 'consumer welfare'" but "the use of one standard versus the other often does not change the results of that analysis, and the cases in which the choice of standard would make a difference are relatively few."[25] In other words, even if we ignore the unsustainable assumptions embedded in CW, the model also does not provide a consensus on the goals of antitrust enforcement. As I argue in the next section, any useful interpretation of Figure 2 for antitrust purposes must first abandon any semblance of a welfare analysis altogether.

II. Current Antitrust Policy is Not Based on Consumer Welfare or Welfare Economics.

A closer inspection of Figure 2 makes it clear that antitrust policy is not based on welfare at all. Notice in Figure 2 that the merger to monopoly is assumed to result in a reduction in cost for the monopolist labelled "efficiencies." Labelling these generic cost reductions as "efficiencies" requires that welfare analysis be abandoned. This is because efficiencies under a welfare approach must refer to increases in utility, not increased corporate profits due to lower costs. Only humans have utility functions, and as described above, consumers' surplus is a monetary measure of utility. We cannot infer anything about changes in utility from a cost decrease unless we know something about the process that is causing the cost reductions and the impact of this process on individuals.

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[22] ROBERT BORK, THE ANTITRUST PARADOX 112 (1978).

[23] Robert Lande, "*Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*," 34 HASTINGS L. J. 65 (1982).

[24] RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 11-13 (1976); Mark Glick, "*Is Monopoly Rent Seeking Compatible with Wealth Maximization*," 3 B.Y.U. L. REV. 499 (1994).

[25] Antitrust Modernization Commission, Report and Recommendations 26 n.22 (2007).

Moreover, it makes no sense to compare a cost reduction (which is not itself a measure of utility) with a reduction in consumers' surplus (which is a measure of utility). By doing so we are comparing concepts with incommensurable units, like apples and oranges.

The Merger Guidelines finesse this problem by abandoning any reference to welfare. Under the Merger Guidelines approach, the benefit of merger efficiencies is not an increase in welfare, but the potential for lower prices (or another non-price benefit).[26] Moreover, under the Merger Guidelines, efficiencies only impact the analysis if they result in a reversal of the original anticompetitive impact. For example, if we are considering price, the efficiencies captured by producers must result in an offset of any potential price increase in order to render them relevant to the analysis.

To illustrate this point, suppose a merger is likely to result in both a small price increase and a massive number of layoffs.[27] To isolate the issue I want to illustrate, suppose further that the labor force reduction takes place in a single town or county and that the unemployed workers are not able to redeploy to other jobs elsewhere, or can do so only at great cost. If the cost

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[26] Merger Guidelines at 29.

[27] My impression is that the impact of mergers on employment reduction is an understudied area. The current literature finds mixed results depending on the country and period studied. *See* Kevin Amess, Sourafel Girma and Mike Wright, "*The Wage and Employment Consequences of Ownership Change*," 35 MANAGERIAL AND DECISION ECONOMICS 161 (2014). However, in many individual mergers layoffs can be significant. Rana Foroohar, "*Businesses Will Continue to Merge and Purge in 2016*," TIME, March 1, 2016 (reporting 150,000 jobs lost in pharma); Knowledge@Wharton, "*The Human Side of Mergers: Those Laid off and Those Left Aboard*," March 30, 2005 (Procter & Gamble merger with Gillette resulted in 6,000 layoffs); Kara Swisher, "As the merger is completed, layoffs of up to 1,000 jobs at the combined AOL and Yahoo are Expected," Recode, June 7, 2017; "*Layoffs Come as Result of PRI/PRX Merger*," Oct 19, 2018; Peter Loftus, Marta Falconi and Hester Plumridge, "*In Drug Mergers, There's One Sure Bet: The Layoffs*," WSJ, April 29, 2014; Alex Keown, "*Pfizer, Allergan Merger Could Result in More than 10,000 Layoffs, Analyst Says*," BIOSPACE.COM, Nov. 30, 2015, Leslie Josephs, "*American Airlines plans manager layoffs, buyouts to slim down 5 years after US Airways merger*," www.cnbc.com, June 19, 2018; Ethan Miller, "*Verizon-Yahoo Merger's New Plan Starts with 2,100 Layoffs*," HOLLYWOOD REPORTER, June 14, 2017.

reductions from these layoffs are sufficient to offset the small expected price increase, the merger would pass muster under the Merger Guidelines. However, the same merger could result in massive reductions in welfare because of the human suffering caused by the increase in unemployment. Even if we restrict the analysis to "consumer" welfare, the reduced incomes of the workers could significantly lower the welfare they attained through reduced consumption of goods and services. Lower reservation prices would result in reduced consumers' surplus. Antitrust analysis would be much different if it undertook a welfare analysis, but it does not.

In a recent paper Scott Hemphill and Nancy Rose also demonstrate that antitrust practice is not consistent with a singular concern for CW. Instead, they argue that antitrust cases are more consistent with preserving the competitive process assumed to protect trading partners on the buyer and the seller side. If buying firms collude and obtain reduced prices (even if passed along to ultimate consumers), it could result in an antitrust violation. The combination of (1) the reduction in competition because of collusion or merger, and (2) the harm to a trading partner whether buyer or seller, is sufficient to establish a violation. As they convey:

> *The imprecision of the phrase "consumer welfare" is hardly surprising, as can be seen in the fact that a merger of competing intermediate good providers is actionable, even though the effect is felt in the first instance by purchasing firms, not final consumers.*[28]

Hemphill and Rose also correctly recognize that reductions in input costs should not always be considered an efficiency. They argue that if an input cost reduction is caused by a merger's reduction in the competitive process it should not be classified as an efficiency. Thus, in the hypothetical posed above, if the layoffs were the result of increased monopsony power,[29] they are

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[28] C. Scott Hemphill & Nancy L. Rose, "*Mergers that Harm Sellers*," 127 YALE L. J. 2078, 2091 (2018).

[29] Jose Azar, Ioana Marinescu, Marshall Steinbaum and Bledi Taska, "*Concentration in US Labor Markets: Evidence From Online Vacancy Data*," ROOSEVELT INST. WORKING PAPER, August 10, 2018; Ioana Marinescu and Herbert Hovenkamp, "*Anticompetitive Mergers in Labor Markets*,"

not efficiencies. This is an easy call. Monopsony reduces final output, and efficiencies resulting from reductions in competition are not recognized by the Merger Guidelines.[30] However, Hemphill and Rose also consider the more interesting case where a merger reduces employment or lowers wages because of an increase in the bargaining power of the firm:

> *There is a further possibility. Even if the harm to input markets from (say) increased bargaining leverage is actionable, it might nevertheless also be accepted as a source of savings passed through.*[31]

In the hypothetical posed above, Hemphill and Rose would likely argue that if the layoffs are caused by an increase in firms' bargaining power with labor, they should not be considered an efficiency. Indeed, in some respects all labor force reductions that occur following a merger are the result of a change in bargaining power, otherwise they would have happened before the merger. Thus, the argument advanced by Hemphill and Rose dictates that the layoffs cannot be considered an efficiency because they are part of the process by which mergers lessen competition.

Notice that the Hemphill and Rose discussion of bargaining leverage and labor never mentions welfare. A welfare analysis would compare the impact of the layoffs on human well-being to the increase in well-being from the cost reduction or profit increase. This illustrates my point, antitrust uses the language of welfare, but the analysis itself is not welfare based.[32]

UNIV. OF PENN WORKING PAPER, Feb. 20, 2018; Suresh Naidu, Eric Posner, and E. Glen Weyl, "*Antitrust Remedies for Labor Market Power*," Feb. 23, 2018 HARVARD LAW REVIEW, forthcoming.

[30] Merger Guidelines ¶ 12 ("Reductions in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger…").

[31] C. Scott Hemphill & Nancy L. Rose, "*Mergers that Harm Sellers*," 127 YALE L. J. 2078, 2091 2107 (2018).

[32] Barak Orbach, "*The Antitrust Consumer Welfare Paradox*," 7 J. COMP. L. & ECON 133, 137 (2011) ("As this article shows, perhaps other than courts, nobody seriously believes that the antitrust consumer welfare have the economic meaning of the term").

III. A Welfare Based Antitrust Policy Would Embrace Objectives Other than Price and Output.

Since Bork, and especially since Marshall, there have been significant advances in the economic literature concerning the problem of interpersonal utility. This section highlights the contribution by John Harsanyi, a Nobel Laureate in economics. Harsanyi offers a solution to interpersonal utility comparisons that potentially enables a guide for antitrust policy grounded in the empirical analysis of human welfare.[33] His solution to the inability to compare interpersonal utility functions is called the "similarity postulate." Harsanyi argues that all of us share a common genetic past that has created a close similarity between how humans experience certain life situations and how these situations impact subjective welfare. If Harsanyi is correct, then we should be able to discover through empirical research the common welfare impact of a variety of situations and use this information to guide policy choices. An important further contribution was made by another Nobel Prize winner, Daniel Kahneman. Kahneman and his colleagues provided an axiomatic defense for the use of empirical studies of experienced happiness, rather than utility inferred from observed market choices, for economic analysis.[34]

Indeed, since Harsanyi's 1982 paper, the economics profession has made great strides in identifying the causes of human happiness and unhappiness. Economist Bruno Frey reports that happiness studies have been performed in 80 countries, comprising over 80% of the world's population, at various periods of time.[35] This literature shows that a welfare based antitrust policy

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[33] John Harsanyi, "*Morality and the Theory of Rational Behavior*," in AMARTYA SEN AND BERNARD WILLIAMS, UTILITARIANISM AND BEYOND (1982); John Harsanyi, "*Utilities, Preferences and Substantive Goods*," 14 SOC. CHOICE AND WELFARE 129 (1996); Jonathan Baker and Steven Salop, "*Antitrust, Competition Policy, and Inequality*," 104 GEO. L. J. 1 (2015).
[34] Daniel Kahneman, Peter Wakker and Rakesh Sarin, "*Back to Bentham? Explorations of Experienced Utility*," 112 QUARTERLY J OF ECON 375 (1997).
[35] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 20 (2010).

would be much different from the one advocated by the Chicago School, and quite unlike the present antitrust regime. Indeed, the empirical literature on happiness supports the goals for antitrust advocated by the New Brandeis School: concerns for labor, small business and the democratic process.

A. Lower Prices Have Little Impact on Welfare.

A central result of this happiness research is that greater consumption of goods and services has little impact on welfare once one is lifted above the poverty threshold, even if these goods and services can be purchased at low prices.[36] This undermines the foundational premise of the CW goal in antitrust. Robert Frank, for example, summarizes the evidence as follows:

> *One clear message of this evidence [from happiness studies] is that beyond some point across the board increases in spending on many types of material goods do not produce any lasting increment in subjective well-being.*[37]

Moreover, scholars have found little relationship between increases in national income and happiness. The following figure illustrates the disconnect between the increasing growth in real income per capita and a flat trend in the growth of happiness in the United States:[38]

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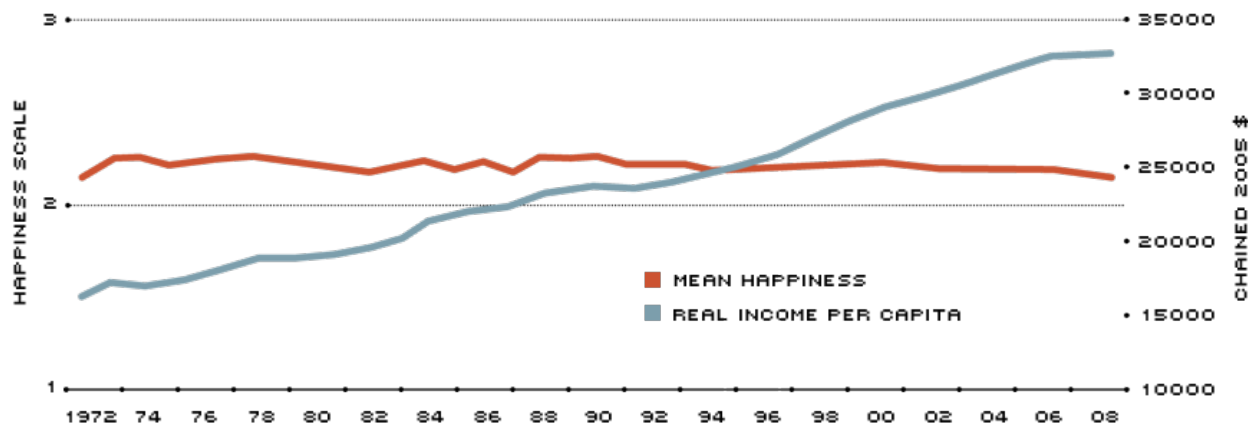
[36] Robert Frank, "*Does Money Buy Happiness?*" in FELICIA HUPPERT, NICK BAYLIS & BARRY KEVERNE, THE SCIENCE OF WELL-BEING (2005).
[37] Robert Frank, "*Does Money Buy Happiness?*" in FELICIA HUPPERT, NICK BAYLIS AND BARRY KEVERNE, THE SCIENCE OF WELL-BEING 465 (2005).
[38] The Figure comes from the Federal Reserve Bank of St. Louis. Ruben Hernandez-Murillo and Christopher Martinek, "*The Dismal Science Tackles Happiness Data*" St. Louis Federal Reserve website, January 2010.



According to Layard, "[t]he fact is that, despite massive increases in purchasing power, people in the West are no happier than they were fifty years ago."[39] Bruno Frey shows how this same relationship holds for the U.K., Belgium, and Japan.[40] Thus, the stubborn focus of antitrust policy on consumer purchases alone has little basis in the empirical welfare literature.

B. Employment has a Major Impact on Welfare.

In contrast, unemployment stands out as one of the most significant factors that negatively impacts self-reported subjective well-being. Numerous studies using individual data for many countries over many periods have found that unemployment significantly lowers human happiness.[41] As summarized by Peter Van der Meer:

> *Unemployment has a severe effect on the subjective well-being of people. This has been shown over and over again. An obvious reason for this drop in well-being is of course the loss of income.*

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[39] Richard Layard, "*Happiness and Public Policy: a Challenge to the Profession*," 166 ECON. J. 510 (2006). Layard presents an identical graph to the figure in this paper.

[40] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 38-39 (2010); Daniel Kahneman, Alan Krueger, David Schkade, Norbert Schwarz and Arthur Stone, "*Would You Be Happier If you were Richer?*" 312 SCIENCE 1908 (2006) ("Most people believe that they would be happier if they were richer, but survey evidence on subjective well-being is largely inconsistent with that belief…Surveys in many countries conducted over decades indicate that, on average, reported global judgments of life satisfaction or happiness have not changed much over the last four decades, in spite of large increases in real income per capita.").

[41] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 46 (2010).

> *But that is not the major explanation…The psychic costs of unemployment are much bigger than the loss of income. But worse than that: unemployment has lasting, scarring effects. That is, the long term unemployed remain unhappy even if they find a job again. They feel and stay unhappy.*[42]

Unemployment has several significant negative welfare effects. Higher unemployment produces depression, anxiety, as well as reductions in feelings of self-esteem and personal control.[43] Unemployment increases suicide rates among those affected.[44] Unemployment causes people to feel they are in violation of basic social norms and expectations.[45] It is interesting that even the employed are negatively impacted by a general rise in unemployment.[46]

C. Self-Employment and Small Business Increases Welfare.

Extensive research demonstrates that self-employed persons typically in small business environments are more satisfied with their jobs than employees of large corporations.[47] This relationship has been found for Germany,[48] Switzerland,[49] the United Kingdom,[50] and the United

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[42] Peter Van der Meer, "*Happiness, unemployment and self-esteem*," Research Report 16016-HRM&OB, University of Groningen, Research Institute SOM (Systems, Organisations and Management); Rafael Di Tella, Robert MacCulloch and Andrew Oswald, "*Preferences over Inflation and Unemployment: Evidence from Surveys of Happiness*," 91 AMER. ECON REV. 335 (2001); Andrew Clark and Andrew Oswald, "*Unhappiness and Unemployment*," 104 ECON. J. 648 (1994); Fumio Ohtake, "*Unemployment and Happiness*," 9 JAPAN LAB. REV. 59 (2012).

[43] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 48 (2010).

[44] DAVID KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 165 (2015)("Studies have found that the suicide rate rises and falls with the unemployment rate. One study estimated that in the United States 4,750 'excess suicides' occurred from 2007 to 2012 compared to previous trends, with the suicide rate higher in states with the greatest job loss…").

[45] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 48 (2010).

[46] *Id.* at 52.

[47] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 72 (2010).

[48] Matthias Benz and Bruno Frey, "*Being Independent is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy*," 75 ECONOMICA 362 (2008).

[49] *Id.*

[50] *Id.*; Peter Warr, "*Self-Employment, Personal Values, and Varieties of Happiness-Unhappiness*," 23 J. OF OCC. HEALTH PSYCH. 388 (2018); Peter Warr and Ilke Inceoglu, "*Work Orientations, Well-Being and Job Content of Self-Employed and Employed Professionals*," 32 WORK, EMPLOYMENT AND SOCIETY 292 (2017).

States.[51] Stefan Schneck reports evidence that self-employment contributes to happiness in 23 of 25 European countries.[52] In further research, Blanchflower, Oswald, and Stutzer show that for a large number of countries self-employment is associated with greater happiness, and that large numbers of people in these countries would prefer to be self-employed but are unable to succeed as an entrepreneur.[53] Many explanations have been advanced to explain the greater welfare from self-employment including job autonomy, control of work processes, and greater work challenges, in spite of lower pay.[54]

Small entrepreneurs also create welfare benefits for others. City planners are unlikely to advocate the elimination of small businesses in a downtown renovation for replacement with a single more efficient Walmart. This position exists because small businesses create direct benefits to communities by providing variety, valuable personal services, as well as tax and employment

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[51] Greg Hundley, "*Why and When are the Self-Employed More Satisfied with Their Work?*" 40 IND. RELATIONS 293 (2001).
[52] Stefan Schneck, "*Why the Self-employed are Happier: Evidence from 25 European Countries*," 67 J. OF BUS. RES. 1043, 1045 (2014) ("The paper shows that the self-employed are, on average, more satisfied with their jobs when compared with paid employees in 23 of 25 European countries. Only the self-employed in Greece and Bulgaria are marginally less satisfied than their employed counterparts."). But see Sana El Harbi and Gilles Brolleau, "*Does Self-Employment Contribute to National Happiness?*" 41 J. OF SOCIO-ECON 670, 675 (2012) ("we found that self-employment has an overall negative direct effect on happiness").
[53] David Blanchflower, Andrew Oswald and Alois Stutzer, "*Latent Entrepreneurship Across Nations,*" 45 EUROPEAN ECON. REV. 680, 690 (2001) ("The latent supply of entrepreneurs appears to be much larger than is commonly supposed. Our hunch – it cannot be more than that at this juncture – is that lack of capital currently holds back millions of potentially entrepreneurial people in the industrial countries.").
[54] BRUNO FREY, *HAPPINESS:* A REVOLUTION IN ECONOMICS 71-73 (2010); Barton Hamilton, "*Does Entrepreneurship Pay? An Empirical Analysis of the Returns to Self-Employment*," 108 J. OF POL. ECON. 604, 629 (2000) (concluding that the "self-employment earnings differential reflects entrepreneurs' willingness to sacrifice substantial earnings in exchange for the nonpecuniary benefits of owning a business…").

benefits to the communities where they are located.[55] In addition, small businesses make unique contributions to the innovation process.[56]

D. Democratic Institutions Have a Major Impact on Welfare.

While the literature concerning the impact of democratic institutions and happiness is less developed, there is a growing consensus that democracy increases happiness. Bruno Frey and Alois Stutzer took advantage of differences in the degree of democracy among Swiss cantons to study the effects of direct participation on happiness. They found that direct democracy was related to higher levels of well-being.[57] They offered an early study limited to a single stable democratic country. In a larger study, Dorn et. al, examined happiness and democracy in 28 countries. They found "a significant positive relationship between democracy and happiness even when controlling for income and culture measured by language and religion."[58] In his recent book, Frey summarized the results from several studies of the impact of democracy as follows:

> *Overall, these results suggest that individuals living in countries with more extensive democratic institutions feel happier with their lives according to their own evaluation than individuals in more*

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[55] *See* STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESS (2006).

[56] Fred Block and Matthew Keller, "*Where do Innovations Come From?" in* STATE OF INNOVATION: THE U.S. GOVERNMENT'S ROLE IN TECHNOLOGICAL DEVELOPMENT 162-164 (2016) ("NSF Data also indicate that Ph.D. scientists and engineers have become more concentrated in small firms . . . also showing innovation by large firms in decline"); Sam Hogg, "*Why Small Companies Have the Innovation Advantage*," ENTREPRENEUR, Nov. 15, 2011; Paul Almeida, "*Semiconductor Startups and the Exploration of New Technological Territory*," *in* ARE SMALL FIRMS IMPORTANT? THEIR ROLE AND IMPACT (Zoltan Acs ed., 1999).

[57] Bruno Frey and Alois Stutzer, "*Happiness, Economy and Institutions*," 110 ECON J. 918, 926 (2000).

[58] David Dorn, Justina Fischer, Gebhard Kirchgassner and Alfonso Sousa-Poza, "*Is it Culture or Democracy? The Impact of Democracy and Culture on Happiness*," 82 SOCIAL INDICATORS RESEARCH, 505, 512 (2007); but see Ronald Inglehart and Eduard Ponarin, "*Happiness and Democracy 1972-2008*," 6 J. OF SIBERIAN FED. UNIV. 1097 (2013) (arguing that happy people result in democratic institutions). Reinet Loubser and Cindy Steenekamp, "*Democracy, well-being, and happiness: A 10-nation study*," 17 J. PUB. AFFAIRS 1646 (2017) (finding a strong relationship between life satisfaction and democracy but only a weak or nonexistent correlation between happiness and democracy).

> *authoritarian countries. These results are not prompted by directly asking whether individuals would be happier living in a democracy. Rather, the subjective, self-reported evaluation of well-being has been gathered, independent of the objective political conditions. Moreover, many other influences on happiness are controlled for, and a certain amount of trust can therefore be placed in the results.*[59]

The empirical evidence that has addressed the impact of democracy on welfare suggests that the processes of decision making, not just their outcomes, matter for well-being. Individuals value choice and meaningful input into the decisions that impact their lives.

E. Empirical Studies of Welfare Support the Traditional Goals of Antitrust, Not Chicago School Goals.

Empirical studies that identify the factors that advance human welfare endorse traditional antitrust goals, those that directed policy in the 1960s and 1970s prior to the Chicago School revolution. The evidence is not supportive of the CW approach introduced by Judge Bork in The Antitrust Paradox.[60] Prior to the adoption of the CW approach there were several accepted goals for antitrust enforcement, including the dispersion of economic power to protect democracy[61] and protection of small business.[62] These goals were abandoned because of the rise of the Chicago

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[59] BRUNO FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 64 (2010).

[60] This point is also made by Maurice Stucke, "*Should Competition Policy Promote Happiness?*" 81 FORDHAM L. REV. 2575 (2013).

[61] Northern Pacific Railway 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. It 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."); Harlan Blake and William Jones, "*In Defense of Antitrust*," 65 COL. L. REV. 377 (1965); Robert Pitofsky, "*The Political Content of Antitrust*," 127 U. PENN. L. REV. 1051 (1979); Joseph Brodley, "*Limiting Conglomerate Mergers: The Need for Legislation*," MAURES SCHOOL OF LAW, Paper 1714 (1979).

[62] 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."); Kenneth

School and its sole focus on price and output. Thus, empirical research on welfare suggests that adherence to the CW standard as advocated by the Chicago School could actually be welfare reducing.

Another reorientation of antitrust policy based on empirical studies of human welfare involves labor. Historically, antitrust policy was anti-labor. Until the New Deal, the antitrust laws were used to prevent unions from effectively negotiating with big business. For example, during the decade of the 1920s alone, Federal judges issued nearly 2,100 anti-labor injunctions hobbling unions from successfully achieving its goals on behalf of workers.[63] Thus, the welfare of labor was never a traditional goal of antitrust enforcement, just the reverse. In contrast, the empirical research summarized in this section establishes that if antitrust policy were to take welfare seriously, it would require a dramatic course correction with respect to labor. Indeed, reducing unemployment would be an antitrust goal well grounded in the new science of welfare.

IV. Recent Defenses of the Consumer Welfare Goal Rely Purely on Unsupported Assumptions.

In this section I consider three recent arguments advanced for retaining the CW standard. The first defense, articulated by Melamed and Petit (M&P) and Herbert Hovenkamp (HH), suggests that CW is important because it establishes a defensible scope for antitrust enforcement.[64] This defense is premised on a misunderstanding of CW. As argued above, the CW theory gives no privileged status to price and output goals over other competing antitrust objectives. A second defense sponsored by Wright and Ginsberg (W&G) contends that the CW standard has led to

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Elzinga, "*The Goals of Antitrust Other than Competition and Efficiency, What Else Counts?*" 125 U. PENN. L. REV. 1191 (1977).

[63] William Forbath, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 118 (1989).

[64] A. Douglas Malamed and Nicolas Petit, "*The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*," 54 REV. OF IND. ORG. 741 (2019); Herbert Hovenkamp, "*Is Antitrust's Consumer Welfare Principle Imperiled?*" UNIVERSITY OF PENN LAW SCHOOL (2019).

greater business efficiency and a corresponding improved economic performance.[65] This claim of causal connection is not based on evidence and the historical record is contrary to W&G's assertion. Finally, Carl Shapiro defends the CW standard by redefining it to fit his own preferred standard for antitrust enforcement.[66] This third approach is merely an accommodation to the existing antitrust consensus. As such, it misdirects antitrust scholars away from a serious debate about antitrust goals.

A. Consumer Welfare Provides No Limiting Principle to Guide Antitrust Enforcement.

The central difficulty with the first defenses of the CW standard advanced by M&P and HH can be traced to a common conceptual error. The defective premise is that CW establishes that price and output goals are welfare increasing, but other objectives are not. For example, HH relates this assumption as follows:

> *[U]nder the modern consumer welfare principle antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low.*[67]

Likewise, M&P state a similar presumption:

> *The CW standard provides a substantive constraint on discretionary decision making.*[68]

As discussed above, CW cannot support any policy prescriptions. Absent a showing that static concerns about price and output are Pareto improving, i.e., that no losers exist, CW is silent about

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[65] Joshua Wright and Douglas Ginsburg, "*The Goals of Antitrust: Welfare Trumps Choice*," 81 FORDHAM L. REV. 2405 (2013).
[66] Carl Shapiro, Opening Statement, Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights, "*The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt*," December 13, 2017.
[67] Herbert Hovenkamp, "*Is Antitrust's Consumer Welfare Principle Imperiled?*" UNIVERSITY OF PENN LAW SCHOOL (2019) at 1.
[68] A. Douglas Malamed and Nicolas Petit, "*The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*," 54 REV. OF IND. ORG. 741, 747 (2019).

which antitrust policies increase welfare. Accordingly, the theory of CW cannot be the basis of a rigorous defense of any particular antitrust goal.

After positing similar opening premises, the two papers offer diverging subsidiary arguments. HH contends that the New Brandeis School, unlike the CW standard, offers insufficient evidence to support its suggested antitrust goals:

> *To date, the strongest and most central claim of the neo-Brandeis movement remains untested; that is its assumption that individuals in our society would really prefer a world characterized by higher prices, but smaller firms. Everyone in society is a consumer and consumers vote mainly with their purchasing choices. The neo-Brandeisians still face the formidable task of providing evidence that most citizens believe they would be better off in a world of high cost smaller firms selling at higher prices, their market behavior notwithstanding.*[69]

HH challenges the New Brandeis school to show that "most citizens believe they would be better off" (a welfare standard) under its alternative goals and standards. But the defenders of the CW standard are not exempt from the same burden and have so far been unable to meet this burden themselves. They merely rest on the misconception that it is sufficient to invoke CW. HH's claim that existing consumer choices can guide policy is also flawed. A large and growing literature has exposed the gaps between observed choice and welfare.[70] Consumer choices are influenced by many factors including existing economic and social conditions. If income was more equally distributed, consumers might reverse their alleged preference for Walmart over small local businesses.

The balance of M&P's additional arguments also fails to withstand scrutiny:

> *Antitrust law evolves by a common law-like process. The CW standard provides a substantive constraint on discretionary decision making. If antitrust law were understood to pursue*

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[69] *Id*. at 3.

[70] Mark Glick, "*The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*," 63 ANTITRUST BULL. 455, 478-485 (2018).

> *multiple and perhaps conflicting or ill-defined objectives, antitrust decision-making would be free to make largely unconstrained value choices. The law's embrace of a coherent--even if sometimes difficult to apply--standard thus promotes the legitimacy of antitrust enforcement by reducing the likelihood of arbitrary interventions into market transactions and makes government and judicial decision makers more accountable.*[71]

M&P state in the third sentence above that "multiple goals" for antitrust should be rejected because they might include "conflicting or ill-defined objectives." Ill-defined and conflicted objectives should be avoided, but M&P provide no evidence that antitrust goals other than price and output would be ill-defined or conflicting. M&P further state that without the CW standard "antitrust decision makers would be free to make largely unconstrained value choices." From the context, the "unconstrained value choices" appear to be those that involve "arbitrary interventions into market transactions…" M&P apparently do not recognize that their preference for market transactions is not a scientific conclusion, but instead is also a value judgment. Virtually all antitrust enforcement decisions benefit some groups compared to others. For example, promoting limited regulation of free markets is often in the interest of big business and is not in the interest of other economic classes and groups such as labor. Thus, choosing among competing visions and policies that differentially impact different economic groups necessarily involves value judgments.[72] Defenders of the CW standard like M&P rely on value judgments as much as their critics. Since the CW theory cannot determine which value judgments to adopt, M&P's point is not a relevant defense of CW.

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[71] A. Douglas Malamed and Nicolas Petit, "*The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*," 54 REV. OF IND. ORG. 741, 747 (2019);

[72] The concept of CW requires numerous value judgments including the adoption of a specific ethical theory based on welfare, the choice to treat a dollar as an equal unit of utility for all, the choice to give distribution secondary importance, and many others.

B. The CW Standard is Correlated with Inferior Economic Performance.

A recent paper by Joshua Wright and Douglas Ginsburg (W&G) also defends the CW standard. W&G state that adoption of the CW standard has led to stronger economic performance:

> *Indeed, there is now widespread agreement that this evolution toward welfare and away from noneconomic considerations has benefitted consumers and the economy more broadly.*[73]

While inviting, this claim is patently false. It is reasonable to date the rise of the CW standard with the election of Ronald Reagan and the Reagan appointees to the Department of Justice and the Federal Trade Commission. The period W&G calls the period of "multiple masters" [74] is arguably the period after World War II until the late 1970s. A comparison of economic performance in these two periods yields unambiguous results. Economic performance was superior on almost every economic metric during the period of "multiple masters" in antitrust. For example, the average growth rate of GDP from 1980 to 2015 was 2.51%, but the growth rate of GDP from 1947 to 1973 was 3.88%.[75] The rate of growth of labor productivity from 1980 to 2015 was 1.18%, and 2.36% from 1947 to 1973.[76] Wages grew faster in the earlier period, distribution of income was more equal, the unemployment rate was lower on average, and investment was stronger.[77] W&G do not provide a single reference showing improved economic performance under the lax antitrust regime ushered in by the CW standard. Contrary to W&G's conclusion, the empirical evidence suggests that restricted antitrust enforcement is associated with inferior economic performance.

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[73] Joshua Wright and Douglas Ginsburg, "*The Goals of Antitrust: Welfare Trumps Choice*," 81 FORDHAM L. REV. 2405, 2406 (2013).
[74] *Id.*
[75] Mark Glick, "*Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*," INET WORKING PAPER (2019), Forthcoming in the Antitrust Bulletin..
[76] *Id.*
[77] *Id.*

Michael Porter takes a position diametrically opposed to W&G, contending that concern for the macroeconomic performance requires a change in antitrust goals. He argues that competition could contribute much more than it does presently to improved macroeconomic economic performance.[78] As a result, he has advocated that the CW standard be replaced with a productivity-based antitrust goal.[79] The advantage of Porter's goal over the CW goal is illustrated by the Department of Justice policy concerning bank mergers. Lax merger enforcement has arguably contributed to macroeconomic instability by producing large and interconnected banking and financial institutions[80] that are "too big to fail."[81] The deregulation of the banking sector beginning in 1980[82] initiated an avalanche of banking mergers. In 1986 there were 14,070 banks. By 2018 this number dropped to 4,806.[83] Most of this reduction was due to bank mergers.[84] For the years 1980 to 1994 alone there were more than six thousand bank mergers.[85] The result has

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[78] MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990); MICHAEL PORTER, HIROTAKA TAKEUCHI AND MARIKO SAKAKIBARA, CAN JAPAN COMPETE (2000).
[79] Michael Porter, "*Competition and Antitrust: A Productivity Based Approach*," (HARV. BUS. SCHOOL, May 30, 2002). A similar point is made by JOE STUDWELL, HOW ASIA WORKS: SUCCESS AND FAILURE IN THE WORLD'S MOST DYNAMIC REGION (2013).
[80] CARMEN REINHART AND KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2009) documenting "the long history of financial crises in their many guises across many countries"); ROBERT ALIBER AND CHARLES KINDLEBERGER, MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES (2005). RANA FOROOHAR, MAKERS AND TAKERS: HOW WALL STREET DESTROYED MAIN STREET, (2016); ALAN BLINDER, AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD (2013).
[81] GARY STERN AND RON FELDMAN, TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS (2004); Frederic Scherer, "*A Perplexed Economist Confronts 'Too Big to Fail'*" HARVARD WORKING PAPER, March 2010.
[82] In 1980, Congress passed the Depository Institutions Deregulation and Monetary Control Act beginning a process of bank deregulation. See JILL HENDRICKSON, REGULATION AND INSTABILITY IN U.S. COMMERCIAL BANKING: A HISTORY OF CRISIS 180-187 (2011).
[83] Economic Research, Federal Reserve Board of St. Louis.
[84] Michal Kowalik, Troy Davig, Charles Morris and Kristen Regehr, "*Bank Consolidation and Merger Activity Following the Crisis*," ECONOMIC REVIEW, Fed. Res. Kansas City (2015) at 6 ("Bank mergers drove the long-term downward trend in the number of banks since 1985.").
[85] Carl Bogus, "*The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*," 49 MICH. J. OF LAW REFORM 1, 86 (2015).

been the emergence of four megabanks each with assets exceeding a trillion dollars.[86] We also know that large interconnected financial institutions can destabilize the macroeconomy, as occurred in 2008. This is a problem borne of the free market that competition policy could have helped ameliorate. Instead, antitrust enforcement agencies allowed the emergence of a small group of interconnected banking giants and have been unreflective about the consequences of their inaction.

All of the bank mergers referred to above were subject to review by the Antitrust Division of the Department of Justice, yet only a handful were challenged.[87] This inaction resulted, at least in part, from the Department of Justice's view that "too big to fail" is not a proper antitrust concern under the CW standard[88]—thus providing a poignant example of how the CW standard[89] can prevent antitrust policy from applying common sense measures to protect the economy. Michael

[86] JONATHAN TEPPER AND DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION 127-128 (2019) (listing Wells Fargo, Bank of America, JP Morgan and Citigroup control 44% of all assets held by US Banks); Frederic Scherer, "*A Perplexed Economist Confronts 'Too Big to Fail'*" HARVARD WORKING PAPER, March 2010 at Figure 1.

[87] *See* discussion in MAURICE STUCKE & ALLEN GRUNES, BIG DATA AND COMPETITION POLICY, 240-249 (2016).

[88] Gina Killian, "*Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*," 69 NOTRE DAME L. REV. 857 (2014); Albert Foer and Don Resnikoff, "*Competition Policy and 'Too Big' Banks in the European Union and the United States*," 59 ANTITRUST BULL. 9 (2014); Alexandra Alper, "*Fed Tested on Too Big to Fail in Merger Review*, REUTERS, Sept. 18, 2011. The reason for this policy is that 'too big to fail' is a result of size and interconnectedness, considerations not considered by the current Horizontal Merger Guidelines. Testimony of Deborah Garza, U.S. Department of Justice, March 17, 2009 before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives.

[89] Carl Bogus, after a review of the post-merger evidence on bank mergers, concluded that "researchers [are] divided on whether mergers between larger banks had no effect on efficiency whatsoever or whether mergers actually made banks less efficient, increasing their operating costs without improvements in service." Carl Bogus, "*The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*," 49 MICH. J. OF LAW REFORM 1, 86 (2015).

Porter's vision might have made a difference. Wooden adherence to the CW standard failed us at a moment when other policy levers were not available or effective.[90]

C. Redefining Consumer Welfare is Not a Defense of its Continued Dominance.

Another approach taken by some defenders of the consumer welfare standard is to simply redefine consumer welfare to mean something other than Judge Bork's original meaning. Carl Shapiro's recent testimony at the Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights is representative of this approach. Professor Shapiro testified that:

> *In practice, the antitrust enforcement agencies and antitrust courts apply the "consumer welfare" standard. As I use the term, applying the "consumer welfare" standard means that a business practice is judged to be anti-competitive if it disrupts the competitive process and harms trading parties on the other side of the market.*[91]

Carl Shapiro's goal for antitrust cannot be reconciled with the CW standard. As Hemphill and Rose point out, a reduction of competition, coupled with an impact on either buyers or sellers best describes current antitrust practice by the courts.[92] But they also indicate that this definition

[90] It is not an adequate response that other agencies or regulations should be relied on to prevent banking consolidation that injures economic performance. The rise of the large banks also led to a gigantic flow of political money that has had a significant influence on banking policy. Thomas Ferguson, Paul Jorgensen, and Jie Chen, *Fifty Shades Of Green: High Finance, Political Money, and The U.S. Congress* 12 (2017) (documenting both the size of financial sector political spending, what it pays for, and its impact). Simon Johnson has also noted that: "The great wealth that the financial sector created and concentrated gave bankers enormous political weight--a weight not seen in the U.S. since the era of J.P. Morgan (the man)." Simon Johnson, "*The Quiet Coup*," THE ATLANTIC, May 2009 at 8. It is unlikely that effective banking regulations can be crafted in light of this financial might. Ironically, lax merger policy both created the economic problem and hobbled the traditional policy solutions to its control.

[91] Carl Shapiro, Opening Statement, Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights, "*The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt*," December 13, 2017.

[92] C. Scott Hemphill and Nancy Rose, "*Mergers that Harm Sellers*," YALE L. J. 2078, 2091 2107 (2018).

is not consistent with CW's sole focus on output and price. A competitive restraint by buyers that distorts the competitive process, but which may not raise prices, remains actionable:

> *When a disruption of the competitive process results in harm to the trading partner, that harm is actionable, whether the trading partner is a buyer or a seller, and whether or not there is an additional effect on quantity*[93].

Carl Shapiro's redefinition of consumer welfare is more consistent with the proposals for revision of the CW goal by the New Brandeis School, than it is with the original Chicago School understanding of CW. For example, Tim Wu, describes Judge Bork's consumer welfare standard as follows: "[W]hat did Bork mean by this [consumer welfare] exactly? He meant that in any antitrust case, the government or plaintiff had to prove to a certainty that the complained of behavior actually raised prices for consumers."[94] In its place, Wu proposes that the CW standard be replaced with the "protection of competition" test, which is "focused on protection of a process, as opposed to the maximization of a value."[95]

Defending, while at the same time redefining, CW creates confusion and undermines the ability to conduct a serious debate about antitrust goals. By defending the CW goal, Professor Shapiro helps preserve the Chicago School limitations imposed on antitrust policy. This is because courts and agencies will look to doctrinal sources for the meaning of the term consumer welfare, not Professor Shapiro's revision. For example, when the Supreme Court in *Reiter v. Sonotone Corp*.[96] declared that "Congress designed the Sherman Act as a 'consumer welfare prescription' it cited Judge Bork.[97] Three years later in *National Collegiate Athletic Association v. Board of*

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[93] *Id.* at 2103.
[94] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 88 (2018).
[95] *Id*. at 136. A similar standard is proposed by Marshall Steinbaum and Maurice Stucke, "*The Effective Competition Standard: A New Standard for Antitrust*," ROOSEVELT (2018).
[96] Reiter v. Sonotone Corp., 442 U.S. 330 (1979).
[97] *Reiter*, 442. U.S. at 343.

Regents of the University of Oklahoma,[98] the Supreme Court defined anticompetitive conduct as a situation where "[p]rice is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference."[99] Likewise, in *Brooke Group v. Brown and Williamson Tobacco Corp.,*[100] the Court interpreted CW to mean antitrust concerns about higher prices and lower output. In its opinion it criticized an older opinion that primary line price discrimination harmed competition relying on evidence of predatory intent. The Court in *Brooke Group* stated that "such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition."[101] Recently, in *Ohio v. American Express Company*, Justice Gorsuch revealed his understanding of the consumer welfare standard in his questioning of Ohio's State Solicitor, Eric Murphy:

> Justice Gorsuch: We're not here to protect competitors, right, Mr. Murphy?
>
> Mr. Murphy: Correct.
>
> Justice Gorsuch: Or – or necessarily even merchants. The antitrust laws are aimed at protecting consumers; you'd agree with that?
>
> Mr. Murphy: Correct, although in this –
>
> Justice Gorsuch: Okay, So, given that, there's no evidence of restricted output in this case, correct?
>
> Mr. Murphy: I – I would agree that it's –there's – it's ambiguous. There's no one way or the other about whether – whether it has restricted output.

[98] National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).
[99] *Id*. at 107.
[100] Brooke Group v. Brown and Williamson Tobacco Corp., 509 U.S. 209 (1993).
[101] *Brooke Group,* 509 U.S. at 221.

> Justice Gorsuch: And that's normally what the antitrust laws care about, is deadweight loss. That's the primary concern of antitrust activity, wouldn't you agree?
>
> Mr. Murphy: Correct, although I think the part that –
>
> Justice Gorsuch: Okay. All right. So you're left with this price question. And you have an increase in price to merchants, but do we have any evidence that consumers [meaning end users], at the end of the day, including the rewards aspect of what they get back, actually pay a net price increase?[102]

Justice Gorsuch is expressing the traditional view of consumer welfare as will others if the CW standard is not abandoned. Based on this history, it is reasonable to predict that professor Shapiro's advocacy of the CW standard will be remembered, but his redefinition will not.

V. Conclusion.

The CW standard is an inappropriate goal for antitrust policy. It is based on flawed assumptions without which it provides no guidance about the welfare impact of antitrust enforcement priorities. An examination of the history of antitrust policy shows that antitrust has always been one of the policy tools used to prevent abuses by big business that harm other groups such as workers, small business, and farmers, or that could impede economic performance. The continued adherence to the CW standard despite its weaknesses exposes the ideological values that sustain it. The CW goal arose as part of the neoliberal revolution in the 1980s that sought to jettison any constraints on the unfettered actions of big business. The CW standard aided in this goal by allegedly providing a justification for very limited antitrust enforcement. Indeed, Judge Bork and his colleagues in the Chicago School argued that possibly the only justifiable antitrust intervention would involve mergers to monopoly or horizontal price fixing, and even here, market

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[102] Oral Argument in Ohio v. American Express Company, February 26, 2018, Case no. 16-1454. This questioning was brought to my attention by Harry First, "*American Express, the Rule of Reason, and the Goals of Antitrust*," unpublished draft, NEW YORK UNIVERSITY SCHOOL OF LAW.

forces would eventually restore competition. The post-Chicago school has undermined most of the original Chicago School arguments; however, the CW goal remains. A real debate needs to occur in antitrust circles concerning the goals and priorities of antitrust enforcement. The CW goal is an impediment to such a process and therefore it should be completely abandoned.