THE CONSUMER WELFARE CONTROVERSY

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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

II. PRESSURES TO EXPAND THE ANALYTICAL FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE SINGLE GOAL MOVEMENT

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

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

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

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

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

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

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

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

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

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

22 *Id.* at 418.

23 *Id.* at 10-11.

24 *Id.* at 418.

IV. CRITIQUE OF THE CW STANDARD

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

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

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

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

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

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

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

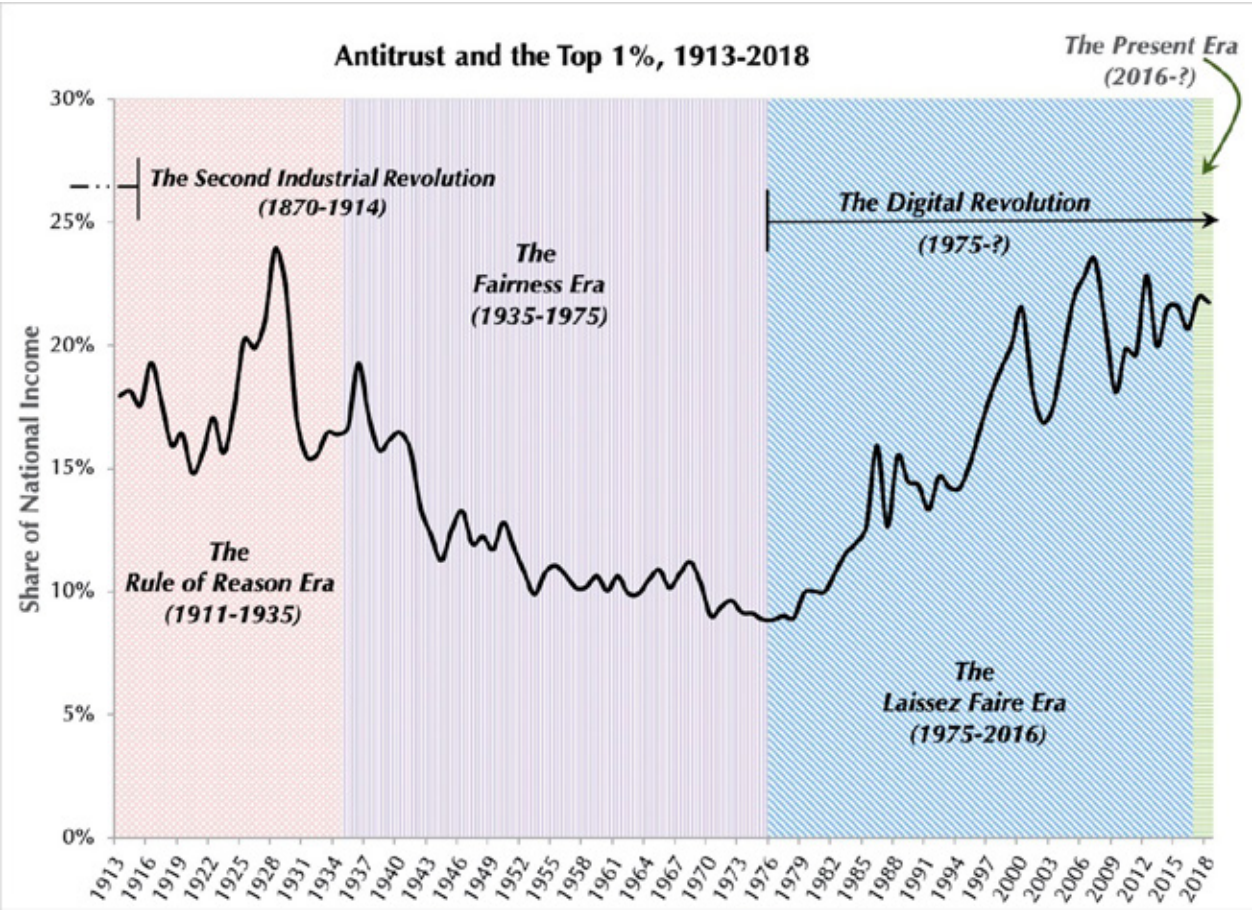
In the United States, income inequality was relatively moderate during antitrust's fairness era (1935-1975) and high in other antitrust eras, when antitrust enforcement was lax.[28] During the past four decades — the *laissez faire* era — income inequality has soared.

25 *Id.* at 57.

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

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

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



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

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

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

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

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

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

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

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

V. THE GREAT MARKETING PLOY

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

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

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