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The Consumer Welfare Standard and the Protect Competition Standard: A Comparison and Assessment

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ABSTRACT

We compare the Consumer Welfare Standard (CWS) and the Protect Competition Standard (PCS) in antitrust. While the two standards are often viewed as mutually exclusive alternatives, there is a larger overlap between the two standards than is usually acknowledged. We first delineate each, recount their respective origins and identify the main supporters of each view. We then compare the two standards across several dimensions: we analyze the practical differences between the two standards in merger and monopolization cases; analyze their fidelity to Congressional intent and to Supreme Court precedent; and discuss how the two standards are connected to normative economic theory. Finally, we discuss the social welfare implications of the differing goals of the two standards. It is our hope that this piece may assist policy makers,

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courts, and antitrust practitioners better understand the two standards and how they can be more effectively and conscientiously applied.

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I. Introduction

This paper explains and compares the two major alternative standards in antitrust: the Consumer Welfare Standard ("CWS") and the Protect Competition Standard ("PCS"). The CWS was first advocated by the so-called Chicago School of economics in the late 1970's, and is supported by many Post-Chicago economists and other scholars. It is arguably the current leading standard among antitrust practitioners. The PCS, in contrast, is a reformulated older standard in antitrust that is favored by the New Brandeis scholars, as well as many other antitrust scholars and economists. After a brief explanation of what is meant by an "antitrust standard," Section II below identifies the major distinguishing features of the CWS and the PCS. Section III then discusses the origins of and identifies the major contributors to each standard, and it distills from the works the major tenets of each standard. Next, Section IV unpacks the practical differences between the two standards as applied to Clayton Act and Sherman Act cases. Section V then evaluates how closely each standard adheres to the plain meaning of the antitrust statutes, their legislative history, and Supreme Court precedent, while Section VI focuses on how faithful each standard is to economic theory. Finally, Section VII evaluates how likely it is that adoption and application of each competing standard will advance social welfare.

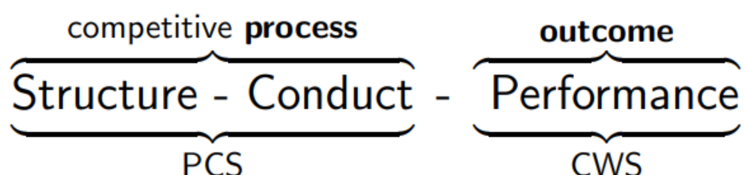
II. The Difference Between the CWS and the PCS

A. Why Legal Standards?

Before undertaking a detailed discussion of the two competing standards, a brief explanation of the purpose of legal standards is instructive. When we use the word "standard," we mean a set of general criteria for evaluating what is relevant to a decision on the legality of a practice. A standard is connected to the goal of the statute or law being enforced, but it is more general than a rule. For example, the "reasonable person" is a standard for analyzing negligence in tort law. But there could be more specific rules applicable to specific conduct, such as a rule that driving over 100 miles an hour is a traffic violation. Analogously, in antitrust, the rule against tying has four elements: (1) the existence of two products; (2) market power in the tying market; (3) a conditioned sale; and (4) substantial commerce affected in the tied market. An antitrust standard may not be needed when the elements of a violation are defined specifically as with tying. In contrast, a standard is useful when the elements of an antitrust violation are defined in a more open or general way. Indeed, in many situations there is no clear judicial rule. For example, when antitrust analysis of novel market conduct is required, there are often few judicial rules to guide that analysis. In such cases, practitioners and judges must work from first principles. These basic principles are embodied in the antitrust standard, and the standard can help craft arguments and direct decision-making. In these cases, the standard is used to limit the range of the analysis to what is relevant for the court.

B. Similarities and Differences Between the Standards

The CWS and the PCS share much in common. Both concern themselves with preserving competition, and both address the impact of any particular challenged market conduct on price and output. But their comparative approaches to addressing these (and other) policy goals differ markedly. To understand the core difference between the CWS and the PCS, we borrow the following analogy from Gregory Werden that we think captures their essential distinction: the three-part Structure – Conduct – Performance criteria in industrial organization.[1] The figure below illustrates this paradigm and its relationship to the two antitrust standards:



So, how do the two standards differ? As detailed below, they differ in both focus and methodology.

1. The PCS Focuses on the Competitive Process, presuming that Competition will Lead to Desired Outcomes.

The PCS focuses primarily on the first two categories of Industrial Organization's Structure-Conduct-Performance paradigm—market structure and conduct. Application of the PCS obviates the need to consider performance because the PCS embraces the Congressional presumption that competition will necessarily result in achievement of the multiple goals articulated in the legislative history of the antitrust statutes. The PCS treats the competitive process as an "instrument" to achieve multiple social goals, including not only lower prices and greater output and innovation, but also protection of small business and dispersion of private economic power.

Further, because the PCS is concerned with structure, it applies economic theory to address structural issues, such as the definition of the relevant market and the extent of market power. Because it analyzes conduct, it also relies on economic models to examine the logical implications of the various types of firm conduct that come under antitrust scrutiny. For the PCS, practices that undermine the competitive process are those that reduce the number of rivals or potential rivals, and/or diminish the opportunities or incentives of rivals to effectively compete. Importantly, in undertaking this analysis, the PCS adopts the dictionary definition of

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[1] Gregory Werden, "The Competitive Process Standard," 86 Antitrust L.J. 579, 582 (2024).

"competition" as "rivalry;" not the economists' definition of "perfect competition," which posits an absence of rivalry by price takers.

2. The CWS Gives Preeminence to Performance Metrics

In contrast to the PCS, the CWS considers all three links in the structure-conduct-performance paradigm, with emphasis on performance. Performance is measured by some definition of economic surplus, following Judge Bork and the Chicago School economists. As articulated by Judge Bork, the CWS adopts as the goal of antitrust enforcement the maximization of some measure of economic surplus.[2]

Stating that the goal of antitrust is consumer welfare is an over-simplification of what the CWS standard actually implies, however. By the time Judge Bork formulated the consumer welfare goal for antitrust, the Supreme Court had already had eighty years to develop antitrust jurisprudence. As a result, the CWS does not attempt to reformulate antitrust as solely concerned with consumer welfare. This would create important conflicts with previous precedent. For example, in the 1945 *Alcoa* case, the Court established the precedent that monopoly alone was not sufficient to establish an antitrust violation even though this was the contention of the government. Instead, both proof of monopoly power and exclusionary conduct were required.[3] But monopoly alone is enough to reduce consumer welfare irrespective of exclusionary conduct. There are also other cases where a pure consumer welfare goal would be untenable. Indeed, in certain circumstances, more competition can actually reduce consumer welfare. For example, it is possible that new entry of competing firms into markets with scale economies could reduce consumer welfare. But no one would contend that more entry of new firms is an antitrust violation. The Supreme Court also formulated a strong per se rule for horizontal conspiracies in the 1940 *Socony-Vacuum* case. Even if a horizontal agreement increased consumer welfare it would be condemned under the *Socony-Vacuum* rule.[4] In our view, therefore, the CWS can best be understood as advocating protecting the competitive process, which also motived prior antitrust cases and is the focus of the PCS, but unlike the PCS, creating exceptions and exclusions where conduct increases consumer surplus.[5] To identify such situations, the CWS looks to performance metrics that proxy increased consumer surplus. So, for example, if an antitrust defendant excluded rivals in a manner that reduced competition, that would be the end of the analysis for the PCS—but for

[2] We identify the various available measures of economic surplus in Section III.A *infra*.

[3] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[4] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[5] A similar conclusion is expressed by Joseph Farrell and Michael Katz, "The Economics of Welfare Standards in Antitrust," UC Berkeley Working Paper, July 20, 2006 at 7, https://escholarship.org/uc/item/1tw2d426 ("It is incomplete and potentially misleading to say that antitrust protects consumer surplus, total surplus or rivals' profits. Rather, conduct can violate the antitrust laws only if it harms 'competition'…Thus, the law has evolved toward prohibiting only acts that both (a) hurt competition in an ordinary (if sometimes vague) sense and (b) hurt efficiency and/or consumer surplus.").

the CWS, if the defendant could establish that its conduct increased output and lowered price, then the CWS could favor the defendant's claim. Under this formulation, the two standards potentially have a large area of overlap in their practical application.

3. Standard Selection is Not Outcome Determinative

It is important to recognize, however, that selection of a particular standard typically does not determine the outcome of the antitrust analysis. One can argue for strong or weak antitrust enforcement under either the CWS or the PCS. The difference is in focus and approach, not outcome. The CWS is consequentialist in approach. In contrast, it might be thought that the PCS is deontological, in the sense that the PCS leaves aside the outcome of the process. The PCS does not ignore outcomes out of neglect or laziness, however. Rather, it simply takes as given that protecting competition will advance the multiple goals Congress crafted the antitrust statutes to achieve. Under the PCS, since Congress already made the determination that the competitive process will lead to the outcomes that Congress desired, it is neither necessary nor desirable for the judicial system to investigate the outcomes.

In the next section we continue to discuss the differences between the two standards by investigating their origins and, in the case of the PCS, the formulations offered by its supporters.

III. CONTRASTING ORIGIN STORIES

A. The Introduction of CWS by Judge Bork

The CWS was introduced by Judge Robert Bork primarily in his book *The Antitrust Paradox*.[6] In Chapter 4 of *The Antitrust Paradox*, Judge Bork defines consumer welfare. However, his explanations are less than cogent (at least in our view) and have led to debates about what definition of consumer welfare best aligns with Judge Bork's text. He states, for example, that "consumer welfare, in this sense, is merely another term for the wealth of the nation."[7] This repeats an approach he took in a 1965 *Yale Law Journal* article where he claimed that antitrust should "implement the policy of wealth maximization."[8] By wealth, Bork might have meant the sum of total goods and services at market prices, or he may possibly have meant to include economic surplus—it is unclear. Then, in Chapter 5 of *The Antitrust Paradox*, he switches

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[6] Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, Basic Books (1978). An early statement of the Chicago School views on antitrust can be found in Aaron Director and Edward Levi, "Law and the Future: Trade Regulation," 51 NW. U. L. Rev. 281 (1956-1957). See also Richard Posner, "The Chicago School of Antitrust Analysis," 127 U. Penn. L. Rev. 926 (1979); Herbert Hovenkamp, "Antitrust Policy After Chicago," 82 Mich. L. Rev. 213 (1985).

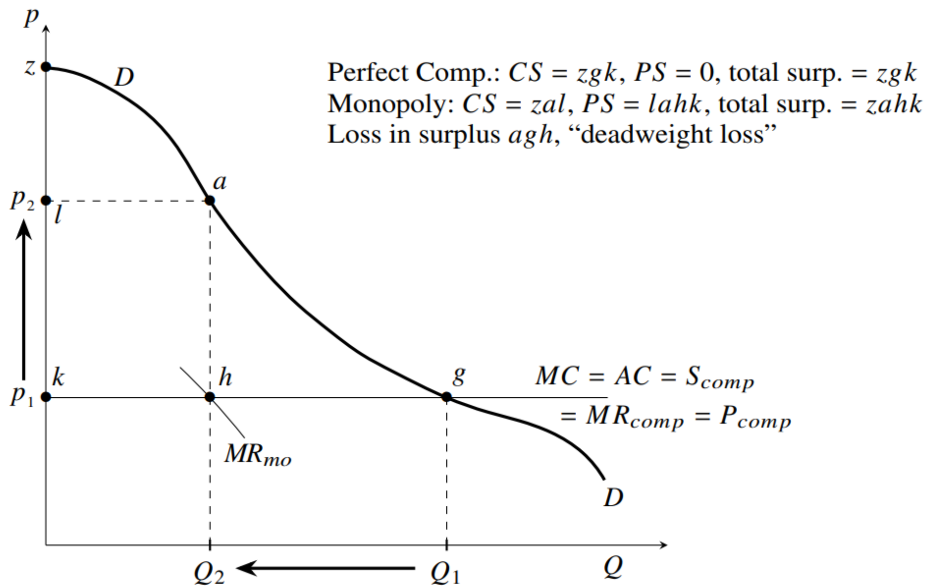
[7] Id. at 90.

[8] Robert Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division," 74 Yale L.J. 775, 838 (1965).

gears somewhat and implies that consumer welfare means consumer and producer surplus, or possibly just consumer surplus. The consensus view is that Bork equated consumer welfare with consumer surplus.[9]

Bork begins Chapter 5 by discussing Oliver Williamson's 1968 paper, "Economics as an Antitrust Defense: The Welfare Tradeoffs."[10] In that paper, Williamson sets out the static relationship of consumer surplus, producer surplus, and deadweight loss, contrasting perfect competition with pure monopoly. Bork refers to Williamson's graph as the "consumer welfare calculus."[11] As Eric Posner has pointed out, however, while Williamson's article contains numerous caveats concerning his assumptions, Bork's presentation ignores these issues and lacks the care Williamson employed.[12]

Judge Bork reproduced Williamson's extension of the simple Marshallian approach, an approach that one finds in basic economics textbooks. We briefly recount this well-known analysis:



When a market is monopolized, consumer plus producer surplus is reduced. The difference between the new and old "consumer plus producer surplus" is referred to as the "deadweight loss." In the graph above, the deadweight loss is the loss of consumer surplus, $lagk$, minus the gain in producer surplus, $lahk$, leaving a deadweight loss of agh. The loss of consumer

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[9] Gregory Werden, "Antitrust's Rule of Reason: Only Competition Matters," 79 Antitrust L.J. 713, 722 (2014).
[10] Oliver Williamson, "Economics as an Antitrust Defense: The Welfare Tradeoffs," 58 Am. Econ. Rev. 18 (1968).
[11] Robert Bork, *supra* note 6 at 107.
[12] Eric Posner, "Market Power, Not Consumer Welfare: A Return to the Foundations of Merger Law," 86 Antitrust L.J. 205, 218–220 (2024).

surplus occurs because the monopolist's profit-maximizing level of output is less than the competitive industry's equilibrium level of output.

While changes in this market cause changes in other markets, it is traditional to restrict attention to a single market. As is well known, the reason deadweight loss is viewed as a negative to society is because it fails the Potential Pareto criterion; that criterion approves policies if their benefits exceed their losses, so that potentially, or theoretically, all the losers could be compensated in a way that would make everyone better off. In the graph above, monopoly is socially harmful because, if a move to monopoly is made, what the winner wins, which is $lahk$, is less than what the losers lose, which is $lagk$. This violates the Potential Pareto criterion (discussed further in Section VI.A.5 below), which only endorses changes if the winner's surplus increase is more than the losers' surplus decrease. Equivalently, monopoly is harmful according to surplus theory and the Potential Pareto criterion because a move from monopoly to perfect competition would result in a positive change in total surplus, with the gain to consumers, $lagk$, being larger than the loss to the monopolist, $lagk$. In this case, consumers could in theory transfer some of their gain to the monopolist, fully compensating the monopolist for his/her loss, while the consumers would still be better off than they were under monopoly. The key idea behind the "potential" part of "Potential Pareto" is that compensation need not be made. In other words, according to the Potential Pareto criterion, the compensation only needs to be feasible in theory, not accomplished in practice.

In the graph above, notice that increases in output (i.e., Q increases on the x axis) increase consumer and producer welfare and reduce deadweight loss. From this relationship, Bork concludes that "[t]he law must be drawn to serve as a mesh that stops output-restricting behavior and permits efficiency-creating activity to pass through."[13] But consumer and producer surplus are not all the components of economic surplus that are affected by a move from competition to monopoly or vice versa. They are simply the only surplus areas that can be visualized on this basic graph of the output market. Economic surplus not only includes consumer and producer surplus, but also surplus from the input markets. For example, labor rents are the difference between what workers are paid and the minimum amount required to induce them to work. Yet, it is unclear whether Bork would consider reductions in labor rents under the rubric of efficiencies or not. Economic surplus can also increase from shifting out the demand curve, but this phenomenon is also absent from Bork's simplified analysis. This demand curve shift can occur through innovation or increases in product quality.

In sum, the essence of the CWS is that proof of an antitrust violation requires harm to the competitive process and, for the CWS, that harm is manifest by a reduction in some or all of the components of total economic surplus, which in Bork's words then "pass through" to the economy as a whole. Accordingly, performance metrics emphasized by the CWS advocates are

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[13] Robert Bork, *supra* note 6 at 70.

those that can proxy reductions or expansion of economic surplus defined to include some or all its components: output and price, and to a lesser extent quality and innovation.

Advocates of the CWS present different variations of the surplus concept that they maintain are most economically meaningful, the performance variables that are most relevant, and differing views of whether antitrust enforcement is presently too lax or too stringent. The main proponents of the CWS include: Herbert Hovenkamp and Fiona Scott Morton,[14] Jon Baker,[15] Carl Shapiro,[16] Douglas Malamed and Nicolas Petit,[17] Rebecca Allensworth,[18] and others.[19] In addition, most antitrust agencies around the world have adopted some version of the CWS, although these agencies provide quite different explanations of what they mean by CWS.[20]

Collectively, these advocates, like Judge Bork, reject the multiple goals traditionally associated with antitrust enforcement and articulated in the legislative history of the antitrust statutes, and believe that they should be replaced by some version of the single goal of increasing some measure of economic surplus. As most economists are aware, however, simplified concepts that appear in introductory textbooks are often seriously revised or circumscribed in more advanced economic textbooks and papers. Whether the surplus goal survives the crucible of scrutiny by prominent welfare economists is discussed in Section VI.

B. The Introduction of the PCS Approach

The PCS fundamentally rejects the antitrust goal of economic surplus. Instead, the PCS takes the benefits of competition on faith, with no need to show that any particular performance measure is tightly associated with greater competition. Instead, competition serves as an instrument to accomplish several social goals. This was the orthodox antitrust position prior to

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[14] Herbert Hovenkamp and Fiona Scott Morton, "The Life of Antitrust's Consumer Welfare Model," ProMarket, April 10, 2023.

[15] Jonathan Baker, "A Competitive Process Goal Won't Strengthen Antitrust," Network Law Review, (Aug. 26, 2022).

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

[17] A. Douglas Malamed and Nicolas Petit, "The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets," 54 Rev. Ind. Org. 741 (2019).

[18] Rebecca Allensworth, "Long-Term Consumer Welfare," SSRN, Jan. 9, 2026.

[19] It is difficult to classify Steven Salop's "Reasonable Competitive Conduct Standard," which is somewhat of a hybrid. See Steven Salop, "The Reasonable Competitive Conduct Standard for Antitrust," ProMarket, April 6, 2023.

[20] See Marshall Steinbaum and Maurice Stucke, "The Effective Competition Standard: A New Standard for Antitrust," Roosevelt Institute (September 2018) at 11–12. https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Effective-Competition-Standard-201809.pdf.

the rise of the CWS.[21] Not long after the rise of the CWS, in 1990, John Flynn advanced a version of the PCS that he called the Competitive Process approach.[22] But it was the New Brandeisian antitrust scholars of the 21st century that are most responsible for the revival and rearticulation of the PCS. New Brandeisian authors who have written about the PCS include Lina Khan,[23] Tim Wu,[24] Zephyr Teachout,[25] and Sandeep Vaheesan.[26] Jonathan Kanter, former Assistant Attorney General in charge of antitrust, also delivered several presentations where he advocated a transition to the PCS for antitrust analysis.[27] Gregory Werden, a prominent DOJ economist, has been in the forefront of advocating a competition process approach to antitrust.[28] We include Eric Posner, and Marshall Steinbaum and Maurice Stucke in the PCS camp because they have suggested approaches that are at least close cousins to the PCS that include its essential component of focusing on structure and conduct when undertaking antitrust analysis.[29]

Tim Wu and Gregory Werden have been two of the most prolific authors on the PCS. We therefore quote from their papers to provide greater clarity on the tenets of the PCS. Greg Werden describes the essence of the PCS as follows:

> The competitive process standard first analyzes the essential nature of suspect conduct. If conduct is not unambiguously procompetitive or anticompetitive, the competitive process standard assesses the proximate effect of the conduct on incentives and opportunities to engage in marketplace competition. This limited assessment employs many of the same tools of economic analysis as the consumer welfare standard, but demands less from them because the

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[21] Harlan Blake and William Jones, "Toward a Three-Dimensional Antitrust Policy," 65 Col. L. Rev. 422 (1965); Kenneth G. Elzinga, "The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?" 125 U. Penn. L. Rev. 1191 (1977).

[22] John Flynn, "Antitrust and the Concept of a Competitive Process," 35 N.Y. Law Sch. L. Rev. 893 (1990).

[23] Lina Khan, "The Ideological Roots of America's Market Power Problem," 127 Yale L.J. 960 (2018).

[24] Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE, Columbia (2018); Tim Wu, "After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice," Competition Policy International Antitrust Chronicle (April 2018) at 2, also available as Columbia Public Law Research Paper No. 14-608 (2018), https://scholarship.law.columbia.edu/faculty_scholarship/2291; Tim Wu, "The Consumer Welfare Standard is too Tainted," ProMarket, April 19, 2023.

[25] Zephyr Teachout, "The Death of the Consumer Welfare Standard," ProMarket, November 7, 2023. https://www.promarket.org/2023/11/07/zephyr-teachout-the-death-of-the-consumer-welfare-standard/.

[26] Sandeep Vaheesan, "The Profound Nonsense of Consumer Welfare Antitrust," 64 Antitrust Bull. 1 (2019).

[27] Jonathan Kanter, "Assistant Attorney General Jonathan Kanter Delivers Remarks for the Fordham Competition Law Institute's 51st annual conference on International Antitrust Law and Policy," Sept. 12, 2024.

[28] Gregory Werden, *supra* note 9; Gregory Werden, *supra* note 1.

[29] Eric Posner, "Market Power, Not Consumer Welfare: A Return to the Foundations of Merger Law," 86 Antitrust L.J. 205 (2024); Marshall Steinbaum and Maurice Stucke, "The Effective Competition Standard: A New Standard for Antitrust," 86 U. of Chi. L. Rev. 595 (2019).

> effects of interest are not ultimate effects on price, output, or consumer welfare.30

Tim Wu adopts a sports metaphor in his description of the core principles of the PCS:

> The protection of competition standard puts the antitrust law in the position of protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure. In that sense, it makes the antitrust law akin to the "rules of the game," and makes enforcers and judges referees, calling out fouls and penalties, with the goal of ultimately improving the state of play, by protecting a competitive process that actually rewards firms with better products.[31]

From the collective works of advocates of the PCS, one can distill several basic principles:

The antitrust laws have several goals, not just economic surplus. Protection of competition is one instrument, but may not be to only policy instrument, to achieve these goals.[32]

It is counterproductive to ask courts to exempt practices that harm competition based on performance metrics.[33] Because multiple goals are at issue, the presence or absence of performance metrics that proxy economic surplus results in a myopic or incomplete antitrust inquiry.

The antitrust laws should focus on protecting competition on the merits. Broadly, competition on the merits occurs when a firm offers a better value. Exclusionary conduct means preventing or making it more difficult or less rewarding for rivals to offer such a better value.[34]

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[30] Gregory Werden, *supra* note 1 at 582.

[31] Tim Wu, *supra* note 24 ("After Consumer Welfare") at 2.

[32] Marshall Steinbaum and Maurice Stucke, *supra* note 29 at 619 ("The effective competition standard restores the primary aim of the antitrust laws—namely, the dispersion and deconcentration of significant private power wherever in the economy it is to be found"); Tim Wu, *supra* note 24 ("After Consumer Welfare") at 8 ("As a legal matter, the 'protection of competition' standard has the advantage of much greater support from congressional intent and earlier precedent [which articulated multiple goals]"); Gregory Werden, *supra* note 1 at 612 ("Antitrust law is a declaration of faith in markets to promote a variety of social interests….).

[33] Gregory Werden, *supra* note 1 at 614 ("Complications and complexities in the causal chain often pose substantial proof problems under the consumer welfare standard."). Teachout, *supra* note 25 at 4 ("We have learned that humans cannot precisely quantify effects in particular cases."); Eric Posner, "Toward a Market Power Standard for Merger Review," ProMarket, April 7, 2023 at 3 ("Price is only one of the harms from loss of competition. The others—like loss of innovation, risks of collusions, or harms to political integrity—are much harder or even impossible to measure.").

[34] Gregory Werden, *supra* note 1 at 626 ("To compete on the merits is to offer better value, as opposed to preventing rivals from doing so.").

Market power is the opposite of competition, and conduct that increases market power indicates a reduction in the intensity of competition. The PCS retains all of the traditional tools of the economic analysis of concentration and market power.[35]

IV. PRACTICAL APPLICATION OF THE TWO STANDARDS TO SHERMAN ACT AND CLAYTON ACT CASES

The CWS and the PCS often result in identical antitrust analyses. However, in some cases, there are material differences. In this section we describe potential situations in merger and monopolization cases where antitrust outcomes can differ under the two standards.

A. Merger Cases: The Clayton Act's Section 7

A comparison of the 1968 and 2013 merger guidelines with the 1982–2010 guidelines, illustrates some of the subtle differences between the CWS's and the PCS's approaches to mergers. In 1968, the Department of Justice declared "the primary role of Section 7 enforcement [to be] to preserve and promote market structures conducive to competition." This language arguably signals an emphasis on the competitive process (more characteristic of the PCS approach), rather than specific performance outcomes (more indicative of the CWS). As the 1968 Guidelines explain, "a concentrated market structure, where a few account for a large share of the sales, tends to discourage vigorous price competition by firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures…." The goal articulated by these early merger guidelines was the prevention of undue concentration, but price competition was also mentioned and the goals could broadly be viewed as compatible with the CWS as well. However, unlike the CWS approach, the 1968 merger guidelines left very limited room for an efficiencies merger defense: "Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies…."

In 1982, the Reagan Administration redrafted the merger guidelines, declaring that "[t]he unifying theme of the Guidelines is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise." Market power was defined as the "ability of one or more firms profitably to maintain prices above competitive levels…." Thus, the goal of merger enforcement shifted subtly from maintaining competition generally by limiting concentration, to preventing mergers that raise prices. Focusing exclusively on mergers that raise prices is more tightly consistent with the CWS and its outcome focus. This core focus made its way into every subsequent version of the merger guidelines until 2023. For example, the 2010 merger

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[35] Richard Posner, Antitrust Law: An Economic Perspective, Chicago (1976) at 3 ("The market share and Herfindahl-Hirschman index (HHI) tests were originally seen as tests of competition: more concentrated markets were inherently less competitive.").

guidelines state that "[a] merger enhances market power if it is likely to encourage one of more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives." Each one of these statements about market power involves an economic change that reduces economic surplus. Output reduction diminishes economic surplus, and lower innovation reduces economic surplus by raising prices or reducing demand.

Each of the subsequent merger guidelines following 1982 also had a version of the efficiency defense. The 2010 Merger Guidelines state that if there are efficiencies that meet certain requirements (merger-specific, verifiable, etc.), a merger will not be challenged if the efficiencies "likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market." Thus, the 2010 guidelines' focus on price increases evince a strong CWS-bias.

In contrast, the 2023 Merger Guidelines appear to mark a shift in favor of the PCS.[36] The opening paragraph of these Guidelines has a quotation from a 1958 Supreme Court decision lauding goals broader than the earlier guidelines: "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."[37] The 2023 Merger Guidelines define competition as "a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, *among many other benefits*" (emphasis added).[38] The goals of improving wages and working conditions, resiliency, consumer choice, and "other benefits" go well beyond economic surplus and is suggestive of a PCS approach.

The 2023 Guidelines advance eleven guidelines for merger control that are consistent with both the CWS and the PCS. However, its efficiency section represents a marked change from the 2010 Merger Guidelines. Under the 2023 approach, only merger-specific, verifiable efficiencies that eliminate "the risk of a substantial lessening of competition" can serve as a potential rebuttal to a claim that a merger could substantially reduce competition.[39] A demonstration of cost savings alone would arguably not satisfy this language. Coupled with

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[36] Zephyr Teachout, *supra* note 25 ("[T]he draft [2023] Guidelines appear to wholly reject the heretofore governing consumer welfare standard and its variants."). https://www.promarket.org/2023/11/07/zephyr-teachout-the-death-of-the-consumer-welfare-standard/

[37] U.S. Department of Justice and the Federal Trade Commission, 2023 Merger Guidelines, https://www.justice.gov/atr/merger-guidelines, quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958).

[38] U.S. Department of Justice and the Federal Trade Commission, 2023 Merger Guidelines, https://www.justice.gov/atr/merger-guidelines/overview.

[39] U.S. Department of Justice and the Federal Trade Commission, 2023 Merger Guidelines, https://www.justice.gov/atr/merger-guidelines/rebuttal-evidence.

the expanded goals enumerated in the guidelines, an efficiency defense would have to restore competition sufficiently to ensure that any impact on wages, working conditions, resiliency, innovation, choice, and other benefits such as democracy (from the opening lines of the guidelines) remain undiminished by the merger. Indeed, to qualify for the efficiency rebuttal, the efficiency emanating from the merger would have to increase competition generally.[40]

In sum, we conclude that the CWS and the PCS are differentiated primarily by the goals of the merger analysis undertaken under the two approaches; that is, whether the harm from a merger is reduced to solely price effects and effects that can be translated to economic surplus, or includes broader goals, and whether an efficiency rebuttal or defense is allowed and the scope of that rebuttal. The 2023 Merger Guidelines appear to have incorporated much more from the PCS standard than earlier guidelines. They acknowledge multiple goals, focus on structural considerations such as concentration, the trend in concentration, multiple acquisitions, and entrenched market power, rather than focusing primarily on post-merger prices as was the case with the 2010 Merger Guidelines. Finally, the efficiency rebuttal under the 2023 guidelines requires proof that competition is restored, rather than only a showing that there are cost savings that are likely to be passed through in lower prices.

B. Sherman Act Cases

In this section, we first briefly discuss Section 1 per se cases and ask whether the per se rule is consistent with the CWS and the PCS. We then consider Section 1 Rule of Reason cases together with Section 2 monopolization cases. Our discussion of the per se rule and the rule of reason is intentionally not comprehensive; instead, it simply aims to illustrate potential overlaps and differences between the CWS and the PCS.

1. Per se Section 1 cases

Certain categories of conduct, such as naked price fixing, bid rigging, and market allocation, are illegal per se under the Sherman Act. The typical CWS explanation for this treatment is that the per se rule is a presumption that these categories of conduct reduce competition and are unlikely to have efficiencies that increase economic surplus. This is because per se categories of conduct reduce competition but do not involve economic integration, which is typically the source of cost savings ("efficiencies") that increase surplus. The per se rule is explained by CWS advocates as a measure to save judicial resources based on this presumption. But, as Werden points out, in criminal cases, judge-made presumptions are prohibited.[41] Instead, the

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[40] Two of the present authors are on record as arguing that the 2023 Merger Guidelines should not have included an efficiency rebuttal at all because it is inconsistent with the plain meaning of the Clayton Act Section 7. See Mark Glick, Robert Lande, and Darren Bush, "The Efficiency Rebuttal in the New Merger Guidelines: Bad Law and Bad Economics," 38 Antitrust 20 (2024).
[41] Werden, *supra* note 30 at 592–3.

federal courts have said that only Congress can make categories of conduct a crime. This portends that perhaps the CWS presumption story is not a viable explanation for all per se cases. Indeed, Werden contends that the per se rule is only consistent with the PCS, which considers only the "reduction in competition" effect. As Werden concludes, "[t]he DOJ will continue to defeat such objections [constitutional challenges to the per se presumption] if the Sherman Act is focused by the lens of the competitive process standard, but any other standard could be fatal to criminal Section 1 enforcement."[42] In rebuttal to Werden, however, CWS advocates may point to the fact that courts often undertake a characterization analysis before applying the per se rule. For example, when horizontal coordinated conduct results in a new product or market, or it is necessary to preserve another competitive goal, then the conduct will qualify for rule of reason treatment. Accordingly, we conclude that there are plausible arguments that the per se rule is consistent with either standard.

2. Rule of Reason cases

In this section we examine the CWS and the PCS in Sherman Act Section 1 and Section 2 rule of reason cases. We treat both sections of the Sherman Act together because the proof requirements are essentially the same.[43] In the recent *AMEX* case, the Supreme Court described the three-step, burden-shifting framework for rule of reason cases as follows:[44] First, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[45] Second, "if the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint."[46] Third, "if the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[47] Sometimes there is a fourth step in which the court "balance[s] the restriction's anticompetitive harm against its procompetitive benefits."[48]

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[42] Id. at 595.

[43] Epic Games v. Apple, 67 F. 4th 946, 998 (9th Cir. 2023); FTC v. Qualcomm, 969 F. 3d 974, 991 (9th Cir. 2020); United States v. Microsoft, 253 F. 3d 34, 59 (D.C. Cir. 2001).

[44] Ohio v. American Express, 585 U.S. 529 (2018). However, the traditional test included a fourth step weighing the competitive harm with the procompetitive justifications. United States v. Microsoft, 253 F. 3d 34, 58-59 (D.C. Cir. 2001).

[45] Ohio v. American Express, 585 U.S. 529.

[46] 138 S. Ct. 2274, 2284 (2018)

[47] Id.

[48] Epic Games v. Apple, 67 F. 4th 946, 994 (9th Cir. 2023).

Important distinctions between the CWS and the PCS arise primarily in the second step. Since rule of reason cases rarely proceed beyond the first two stages, we do not discuss stages 3 and 4.[49]

(a) Proving an Anticompetitive Effect

Whether the challenged restraint has an anticompetitive effect can be demonstrated with direct or indirect evidence. Direct evidence of anticompetitive effects is usually demonstrated by the restraint's impact on the CWS performance criteria, "such as reduced output, increased prices, or decreased quality in the relevant market."[50] However, indirect evidence of "proof of market power plus some evidence that the challenged restraint harms competition" is also acceptable, thus making room for analysis of the PCS criteria as well. Proffering indirect proof involves establishing that the challenged conduct is likely to impair competition by increasing the defendant's market power or facilitating its exercise.[51] Werden argues that, under the PCS, the plaintiff would be required (in the first stage) to establish a cogent narrative that shows that the challenged conduct harms or excludes rivals and harms the competitive process:

> Whether a plaintiff purports to rely on direct evidence, indirect evidence, or both, the core of the plaintiff's proof is a cogent narrative. Under the competitive process standard, this narrative must explain how competition works and how the challenged restraint adversely affects competition.[52]

Tim Wu describes the PCS approach to the first stage of proof in a similar way: "The basic question is whether the complained of conduct is competition on the merits, or rather, an effort to disable or subvert the competitive process?"[53] In particular, is it "competition on the merits (i.e., a better or cheaper product) or a potentially illegitimate method (e.g., sabotage, exclusionary deals, tying predation, manipulation of a standards process, and so on). It is here that any procompetitive justification for the conduct is considered."[54]

Neither Werden nor Wu, however, satisfactorily specify (at least in our view) what constitutes competition on the merits and what practices are harmful to the competitive process.

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[49] Michael Carrier, "The Rule of Reason: An Empirical Update for the 21st Century," 16 Geo. Mason L. Rev 827 (2009).

[50] Id.

[51] The standard for analysis of conduct under Section 2 is similar: the Court in *Aspen Ski* cited to the test offered by the 1978 Areeda and Turner treatise, that exclusionary conduct "comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n. 32 (1985). Thus, exclusionary conduct is conduct that reduces the incentives or opportunities of rivals to compete, but in a manner that is not competition on the merits.

[52] Gregory Werden, *supra* note 1 at 621.

[53] Tim Wu, supra note 31 at 8.

[54] Id. at 9.

Competition in which rivals offer a better product or price that also disadvantages its rivals is of course competition on the merits. More problematic assessments arise when contracts, policies, or innovations are claimed to result in better consumer values but simultaneously exclude rivals. Indeed, there is no economic theory that clearly delineates the boundaries of competition on the merits. Thus, in complicated cases, we routinely see prominent economists on both sides, using the same data and applying the same basic economic principles, but arriving at opposite conclusions.

There is also no consensus favoring any particular test for judging anticompetitive conduct short of a full effects analysis. Several tests have been formulated, including the "profit sacrifice" test, borrowed from predatory pricing case law, that evaluates whether the defendant has reduced its profits by undertaking the exclusion. If it has, then the conclusion follows that the defendant's intent must be to protect its market power rather than compete on the merits.[55] Steve Salop points out that exclusion need not reduce the defendant's profits—so the "profit sacrifice" test may be a sufficient condition to demonstrate anticompetitive conduct, but it is not a necessary condition for such a demonstration.[56] Tying is one example of exclusion that need not reduce the defendant's profits. Moreover, product improvements are almost always costly in the short run. A different approach offered by Werden is the "no economic sense" rule.[57] Under this test, conduct that only makes sense because of the exclusion is deemed anticompetitive. However, this test can also face difficult cases. Salop notes that design changes can increase profits slightly, and thus make some "economic sense," but also cause significant harm to competition.[58]

No clear consensus on a test to detect when competition veers from competition on the merits has developed under either standard. What is clear is that the PCS rejects the requirement that a challenge to a monopolist's conduct must entail a showing that performance variables such as economic surplus have been adversely impacted. Werden notes that meeting such a requirement is often impossible. For example, both Apple and Google defended their alleged exclusionary practices in recent litigation by pointing to growing output.[59] The District Court judge in *Apple* noted, however, that output growth could have resulted from the "expansive market growth caused by innovation in the field" rather than competition on the merits.[60] As

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[55] Covad Communications Co. v. Bell Atl. Corp., 398 F 3d 666, 676 (D.C. Cir. 2005) ("in the vernacular of antitrust law, a 'predatory' practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor").
[56] Steve Salop, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard," 73 Antitrust L.J. 311 (2006).
[57] Gregory Werden, "Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test," 73 Antitrust L.J. 413 (2006).
[58] Id.
[59] Epic Games v. Apple, 67 F. 4th 946, 984 (9th Cir. 2023); Marty Swant, "DOJ and Google Make Closing Arguments in Landmark Adtech Antitrust Trial," November 26, 2024.
[60] Epic Games v. Apple, 559 F. Supp. 3d 898,1037 (N.D. Cal. 2021).

Werden describes, in many cases determination of "but for" output in the absence of the conduct at issue is an impossibility. This can be the case when high tech platforms gain market power early in the platform's formation, or where auction markets are manipulated, or in cases where price discrimination is possible.[61]

(b) Articulating a Pro-Competitive Rationale

In the second stage of the inquiry, the burden shifts to the defendant to offer non-pretextual procompetitive rationales for the conduct. Here, the two standards diverge: The CWS seeks to exempt practices that do not reduce consumer surplus or are "efficient." While, under the PCS, a procompetitive justification must be competition-based and must increase competition sufficiently to offset the competitive harms identified in step one. In other words, the justification must show that the alleged anticompetitive practices increase competition. This is only possible when the conduct solves a market failure problem such as eliminating free riders or reducing moral hazard.[62] As a consequence, the menu of procompetitive justifications is quite limited under the PCS.

To take one example, in *Epic v. Apple*, the Ninth Circuit upheld Apple's exclusion of Epic's app store partly on the grounds of the procompetitive justification of protecting Apple's intellectual property.[63] The Ninth Circuit's procompetitive defense would not be credited by the PCS, however. Intellectual property is a legal monopoly that is bestowed on an inventor to encourage future innovation, quite the opposite of competition. Defending IP is not necessarily increasing competition. Indeed, under the PCS, it is arguable that no antitrust exemption should exist for protecting IP. The intellectual property laws have their own remedies. If Apple needed to exclude a rival based on intellectual property, they could have brought an infringement lawsuit. In that case, Apple would have to prove that it has a valid patent or copyright (or other IP) and that the rival is infringing. By allowing a procompetitive defense based on intellectual property protection in a monopolization case, the defendant would unjustifiably be relieved of the burden of showing validity or infringement. Indeed, the Ninth Circuit merely referred to Apple's R&D spending in upholding its defense. However, since all tech platforms must invest in R&D, the opinion proves too much and creates a troublesome precedent. In *Image Technical v. Eastman Kodak*, an earlier Ninth Circuit case, the court rejected Kodak's justification for the tying of parts and service based on Kodak's parts patents. It rejected Kodak's protection of IP defense finding it pretextual and an attempt to extend market power beyond the patent grant.[64]

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[61] Gregory Werden, *supra* note 1 at 607–612.

[62] John Newman, "Procompetitive Justifications in Antitrust Law," 94 Indiana L.J. 501 (2019) (showing that courts have accepted numerous dubious procompetitive justifications).

[63] 67 F. 4th at 971.

[64] Image Technical Services v. Eastman Kodak Co, 125 F. 3d 1195, 1218-1220 (9th Cir. 1997).

Advocates of the CWS might also reject a proffered procompetitive defense of protecting IP, but for different reasons. The argument would be that the link between IP and innovation is too attenuated. Indeed, Boldrin and Levine reviewed numerous academic studies and concluded that the evidence did not support "much of a connection between patents and innovation."[65] James Bessen and Michael Meurer reviewed a large body of empirical work by economists studying the impact of patents. They report few studies that show patents increase innovation or growth in any significant, economy-wide manner.[66] Instead, they report patent "arms races" that increase innovation costs and create barriers to entry for firms seeking to challenge powerful incumbents, but do little to foster innovation.[67]

In sum, we conclude that the choice between application of the CWS or the PCS is unlikely to impact the outcome in rule of reason cases except at the margins. Michael Carrier shows that 97% of rule of reason cases are resolved in the first stage, where both a performance-based analysis and indirect proof is acceptable.[68] However, the reason for the defendant's actions is also part of the atmospherics of any rule of reason case. This means that procompetitive defenses likely loom larger than Carrier's data would suggest.

V. Comparative Fidelity of the two standards to the Antitrust Statutes, Congressional Intent, and Supreme Court Precedent

In this section we review how congruent each standard is with the plain meaning of the Sherman Act and the Clayton Act, their legislative histories, and Supreme Court precedent.

A. The Plain Meaning of the Words of the Sherman Act and Clayton Act

1. Sherman Act Section 1

Textualism is a method of statutory interpretation that focuses on the precise words of the statute and gives these words the plain and ordinary meaning they had at the time the statute was enacted. The operative words of Section 1 of the Sherman Act are: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." A critical phrase is "restraint of trade." What was the meaning of a restraint of trade in 1890? Did it mean conduct that reduced consumer surplus, which would be supportive of the CWS, or did it mean a reduction in competition, which would align with the PCS? Judge Bork argued that "restraint of trade" meant reduction in output based on his understanding of statements by Senator

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[65] Id. at 5

[66] James Bessen and Michael Meurer, Patent Failure: How Judges, Bureaucrats, and Lawyers put Innovation at Risk, Princeton (2008). See also A.B. Jaffe and J. Lerner, Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do about It, Princeton (2004).

[67] Michele Boldrin and David Levine, "The Case Against Patents," 27 J. of Econ Persp. 9 (2013).

[68] Michael Carrier, *supra* note 49.

Sherman early in the debate process.[69] However, most scholars conclude that Congress in 1890 gave "restraint of trade" the meaning it had in the common law at the time.[70] At common law, the term "restraint of trade" meant limiting or preventing someone from engaging in a trade or business. For example, in a leading common law case, *Mitchel v. Reynolds*, the restraint at issue was a contract that prevented plaintiff's work as a baker after having sold his bakery. While the common law at the time distinguished between reasonable and unreasonable restraints, the doctrine applied to restraints that prevented a competitor from competing.[71] A careful textual analysis of the words in Section 1 of the Sherman Act by Robert Lande concluded that there is simply no evidence to support the claim that the words "restraint of trade" mean reduction in consumer surplus or efficiency.[72]

But, a CWS advocate might respond, what Congress imported into the statute was "the common law itself and not merely the static content that the common law had assigned to the term in 1890."[73] After all, the Supreme Court has noted that different types of agreements may be classified as restraints of trade "in various times and circumstances."[74] However, as explained below, in our review of Supreme Court cases, most restraints of trade are condemned because of the competition-reducing aspect of the restraint and not because the restraint reduced economic surplus.

2. Sherman Act Section 2

The words of Section 2 of the Sherman Act state: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…." According to Judge Bork, Section 2 of the Sherman Act "outlaws not the condition of monopoly, but only the process of monopolizing."[75] Based on legislative history, not text, Bork concluded that "monopolize" excluded achieving a monopoly by efficiency means.[76] Robert Lande's textualist analysis of the word "monopolize"

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[69] Robert Bork, "Legislative Intent and the Policy of the Sherman Act," 9 J. of Law and Econ. 7, 16 (1966).

[70] United States v. Trans-Missouri Freight Ass., 166 U.S. 290 (1897) (understanding the term "restraint of trade" in the Sherman Act to have its common law meaning).

[71] See the detailed historical analysis by Christopher Grandy, "Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis," 53 J. of Econ. Hist. 359 (1993).

[72] Robert Lande, "A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers and Consumer Choice," 81 Fordham L. Rev. 2349, 2368 (2013).

[73] State Oil Co. v. Khan, 522 U.S. 3, 21 (1997) quoting Business Electronics v. Sharp Electronics, 485 U.S. 717, 732 (1988).

[74] Id. at 20–21.

[75] Robert Bork, *supra* note 6 at 57.

[76] Id. at 62 ("…it led Congress to agree that even complete monopoly should be lawful if it was gained and maintained only by superior efficiency").

comes to a markedly different conclusion.[77] Using four dictionaries from the 1890 period considered reliable by Justice Scalia, as well as the *Oxford English Dictionary* and the *Webster's Dictionary* cited by Senator Edmund during the Sherman Act congressional debate, Lande concluded that "all of the surveyed roughly contemporaneous dictionaries defined 'monopolize' as simply to gain a monopoly." On the other hand, monopoly lowers consumer surplus, so adding a conduct requirement to monopoly could be interpreted as a rejection of a unitary goal of increasing consumer welfare. Ironically, Lande's analysis could be justified under the CWS. Moreover, Lande found that a monopoly meant the ability to control the market, not a sole seller. We quote Lande's summary:

> In summary, all of the period's dictionaries that Justice Scalia preferred defined "monopolize" as simply to gain a monopoly of a market. All but one included firms that controlled or commanded a market in their definition of firms that monopolized a market, a formulation that roughly corresponds to the modern requirement of monopoly power, which can be met by firms with only a seventy percent market share. None of these dictionaries required anticompetitive conduct for "monopolization," and there is no explicit or implicit language in Section 2 that requires anticompetitive conduct for a violation. A textualist analysis of contemporary legal treatises and cases yields the same result.[78]

Lande also analyzed the word "attempt" and concluded that a textualist analysis of "attempt" means intent to gain a monopoly and at least one act in furtherance of this plan.[79]

Thus, to the extent that Section 2 incorporated the common law understanding of monopolies at the time of enactment of the Sherman Act, there is scant support for Bork's interpretation of the text of Section 2. Nor does the common law prohibition on monopoly at the time of the passage of Section 2 support Bork's interpretation. The common law of monopolies applied to necessities of life, such as food. But, if the legal goal were to expand consumer surplus and reduce deadweight loss, the prohibition would have been on high elasticity luxury goods, not goods with inelastic demand.

3. Clayton Act Section 7

We next consider Section 7 of the Clayton Act that applies to mergers and acquisitions. The statutory language states that mergers are prohibited if "the effect of such acquisition may be substantially to lessen competition or to tend to create monopoly…." In *The Antitrust Paradox*, Judge Bork spends some time analyzing this language. He considers five potential definitions

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[77] Robert Lande, "Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law," 4 Utah L. Rev. 813 (2023).
[78] Id. at 820.
[79] Id. at 822.

of "competition." He rejects four of these. One of the definitions he rejects is the economists' notion of "perfect competition."[80] He also rejects the PCS definition of competition as rivalry. Bork objects to defining competition as rivalry because he thinks promoting rivalry leads to a situation of atomized competitors that would place the United States "in a worse economic condition than Bangladesh."[81] Judge Bork's argument is not convincing in our view, however. The Clayton Act only impacts mergers that "substantially" lessen competition and firms can grow by internal expansion.

Curiously, Bork defined "competition" as maximized consumer surplus:[82]

> "Competition" may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.

But that definition is untenable in our view. There is no textual support for defining competition as surplus maximization. Nor does competition imply social surplus maximization in economic theory, except under conditions of perfect competition, which Bork expressly dismissed.[83]

Alternatively, Eric Posner and Louis Kaplow argue that Bork defined competition as efficiency. Posner writes that "[i]t is Bork's assertion that the word competition means efficiency…."[84] Louis Kaplow proffered a similar interpretation: "The Chicago School position is that competition should be taken to mean economic efficiency…."[85] We disagree with this reading of Bork's text. We do not read Bork as defining competition as efficiency because Bork defines efficiency very differently throughout the text of *The Antitrust Paradox*.[86] Bork appears to use "business efficiency," "productive efficiency," and "efficiency" as synonyms.[87]

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[80] Bork, s*upra* note 6 at 59–60; see also 51.
[81] Id. at 59.
[82] Id. at 61.
[83] Andreu Mas-Colell, Michael Whinston, and Jerry Green, MICROECONOMIC THEORY (1995), Section 10.E (326–331). See *infra* Section VI.A.
[84] Eric Posner, *supra* note 12 at 216.
[85] Louis Kaplow, "Antitrust, Law & Economics, and the Courts," 50 Law and Contemporary Problems 181, 209. The footnote to this passage cites pages 51, 58–61, and 91 of *The Antitrust Paradox*, but pages 51 and 58–61 do not even contain the word "efficiency," and the one mention of the word "competition" on page 91 does not link it to "efficiency."
[86] For example, Bork wrote, "Only a consumer welfare value that, in cases of conflict, sweeps all other values before it can account for Congress's willingness to permit efficiency-based monopoly." Indeed, employing Kaplow/Posner reading, Bork's last phrase would be equivalent to "competition-based monopoly," which no author, including Bork, would likely think is sensible.
[87] Id. at 7–8.

He explicitly writes that "when, for convenience, the word 'efficiency' alone is used, productive efficiency is meant."[88]

Even if we were to accept the Kaplow/Posner reading of Bork, however, competition cannot mean efficiency. There is no textual support for defining competition as efficiency. Nor is (perfect) competition the same thing as (Pareto) efficiency in economic theory: they are different, a point Kaplow and Posner make.[89] Elaborate proof (by Debreu and Arrow) is necessary to establish that perfect competition leads to Pareto efficiency, a result known as the first fundamental theorem of welfare economics.[90] No assumptions or proof would be necessary if competition and efficiency were the same thing. Posner points out that "competition" and "efficiency" also "do not mean the same thing in common speech," "nor is Bork correct that if the ordinary meaning of competition is used, the economy would be atomized."[91] We add to Posner's criticism of equating competition and efficiency by pointing out that, if Congress wanted to exempt efficient mergers, they knew how to do it. When the Clayton Act was amended in 1936, adding the Robinson Patman Act to Section 2, it included a cost justification defense, which is essentially a defense for price discrimination when it merely passes on the benefit of selling to a more efficient firm.

Thus, there is no reason to believe that the word "competition" should not be given its natural definition of "rivalry" consistent with the PCS. The words of Section 7 of the Clayton Act cannot be read as only prohibiting inefficient mergers as claimed by Judge Bork.

Having analyzed the plain meaning of the words used in the antitrust statutes, we now turn to their legislative history and how that history comports with the competing CWS and PCS standards.

B. The Legislative History of the Antitrust Statutes

In *The Antitrust Paradox*, Judge Bork famously wrote that "[a]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer that we give."[92] Bork recognized that the question of goals should derive from statutory interpretation, and this motivated him to analyze the legislative history of the Sherman Act, first in his 1966 *Journal of Law & Economics* article,[93] and then in Chapter 2 of *The Antitrust Paradox* a decade later.[94] Bork

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[88] Id. at 91.
[89] *Supra* note 85 at 210; s*upra* note 12 at 216.
[90] See for example Mas-Colell et al., *supra* note 83, Section 16.C.
[91] *Supra* note 12 at 216.
[92] Robert Bork, *supra* note 6 at 50.
[93] Robert Bork, *supra* note 69.
[94] Robert Bork, *supra* note 6.

concluded from his study of that history that the sole goal of the Sherman Act was to maximize consumer welfare.[95] Bork likewise concluded that the goal of the Clayton Act and the Robinson Patman Act were the same, both because consistency required that all of the antitrust statutes have the same goal, and because the legislative history of these statutes, according to Bork, also revealed a similar goal.[96]

A detailed exposition of the legislative history of the antitrust statutes is beyond the scope of this paper.[97] Instead, we merely point out that, since Judge Bork advanced his claim, few if any other legal scholars or historians have arrived at a similar conclusion or have come to Judge Bork's defense. For example, John Flynn writing in 1988 observed that "everyone who has made a considered study of the legislative history of the major antitrust laws flatly rejects Judge Bork's assertion that 'consumer welfare' was the only goal Congress had in mind when it enacted the Sherman Act."[98] This one-sided academic rejection of Judge Bork's thesis did not change after Professor Flynn's paper. Numerous other studies of the legislative history after 1988 also rejected the singular consumer welfare goal thesis.[99] Indeed, Bork's brief summary of the legislative history of the Clayton Act has been extensively rejected,[100] as has his summary of the history of the Robinson-Patman Act.[101]

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[95] Id. at 51.
[96] Id. at 63–66.
[97] We have discussed the legislative history of the Sherman Act and the Clayton Act in previous works. See Mark Glick and Darren Bush, "Breaking Up Consumer Welfare's Antitrust Policy Monopoly," 56 Suffolk Univ. L. Rev. 201 (2023); Mark Glick, David Mangum, and Lara Swensen, "Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent," 60 Antitrust Bull. 279 (2015).
[98] John Flynn, "The Reagan Administration's Antitrust Policy, 'Original Intent' and the Legislative History of the Sherman Act," 33 Antitrust Bull. 259 (1988). Other scholars coming to a similar conclusion include: Eleanor Fox, "The Modernization of Antitrust: A New Equilibrium," 66 Cornell L. Rev. 1140 (1981); Robert Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretations Challenged," 34 Hastings L.J. 65 (1982); James May, "Antitrust Practice in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918," 135 U. Pa. L. Rev. 495 (1987); Robert Pitofsky, "The Political Content of Antitrust," 127 U. of Pa. L. Rev. 1051 (1979); Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION, The Johns Hopkins University Press (1955).
[99] Herbert Hovenkamp, "Antitrust's Protected Classes," 88 Mich. L.R. 1 (1989); Rudolph Peritz, COMPETITION POLICY IN AMERICA 1888–1992: HISTORY, RHETORIC, LAW, Oxford U.P. (1996); Christopher Grandy, *supra* note 71; Thomas Haxlett, "The Legislative History of the Sherman Act Re-examined," 30 Econ. Inquiry 263 (1992); Stephen Martin, "Dispersion of Power as an Economic Goal of Antitrust Policy," Institute for Research in the Behavioral, Economic, and Management Sciences, Purdue Univ. working paper 1285 (December 2016), https://business.purdue.edu/research/working-papers-series/2016/Martin-Dispersion%20of%20Power%20as%20an%20Economic%20Goal%20of%20Antitrust%20Policy.pdf.
[100] Robert Lande and Sandeep Vaheesan, "Preventing the Curse of Bigness Through Conglomerate Merger Legislation," 52 Ariz. St. L.J. 75 (2020); Mark Glick and Darren Bush, *supra* note 97. See also Posner, *supra* note 12 at 216 ("Few people have been persuaded by Bork's interpretation of Section 7 [footnote to Tim Muris as an exception], and no court has adopted his view that Congress sought to maximize efficiency").
[101] Mark Glick, David Mangum, and Lara Swensen, *supra* note 97.

Instead, there appears to be widespread agreement that Congressional history evinces several goals for antitrust enforcement. What follows are a few illustrative examples.

1. The Sherman Act

As noted by James May, the Sherman Act Congressional "debates appear to indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization."[102] Indeed, discussions of "pure" economic effects are hard to locate in the legislative history. The three main protagonists in the Sherman Act Senate debates, Senators Sherman, Hoar, and George, all expressed concerns arising from perceived political domination by big business. For example, David Millon quotes from Senator Sherman's famous floor speech:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and break down competition.103

Senator Hoar likewise voiced concern about monopolies and described "the great monopolies as a menace to republican institutions themselves."[104] Senator George hoped the legislation would specifically protect small businesses that were harmed by monopolies:

> It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises.[105]

Hence, the major Senate drafters of the text of the Sherman Act expressed at least concern for two goals other than consumer welfare: political democracy and protection of small business.[106]

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[102] James May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918," 50 Ohio St. L.J. 257, 288 (1989). May also commented, "Sherman continued to embrace traditional nineteenth century assumptions treating economic opportunity, efficiency, competition, wealth distribution and political liberty as all of a piece." Id. at 290.

[103] David Millon, "The Sherman Act and the Balance of Power," 61 S. Cal. L. Rev 1219, 1277–1278 (1988) (quoting 21 Cong. Rec. 2457 (1890)).

[104] Id. at 1277 (quoting 21 Cong. Rec. 2460 (1890)).

[105] Hans B. Thorelli, *supra* note 98 at 191 (quoting 21 Cong. Rec. 2597 (1890)).

[106] The Sherman Act was debated in the context of a period of deflation and economic instability, and efforts by big business to avoid the impact of competition and deflation on profits. Prices bottomed out in May 1894, rose slightly, fell back to the same bottom level in August and September of 1896, then rose sharply thereafter (with a few temporary drops) for more than a decade. See https://fred.stlouisfed.org/series/M04051USM324NNBR#.

2. The Clayton Act and the FTC Act

The last two major comprehensive antitrust statutes, the Federal Trade Commission Act (the "FTC Act") and the Clayton Act, were passed in 1914 during the Wilson Administration.[107] Once again, portions of their legislative history evince broad concerns, significantly beyond traditional economic factors. Zephyr Teachout and Lina Khan point out that the Congressional debates around the FTC Act displayed material concern about the political influence of large corporations, and the resulting lesser opportunities open to other social classes.[108] Robert Lande and Sandeep Vaheesan have collected Congressional statements during the Clayton Act debates expressing disquiet about corporate size, political influence of corporations, and the closure of economic opportunities.[109] For example, they highlight the remarks of Representative Kelly, who stated: "Enterprises with great capital have deliberately sought not only industrial domination but political supremacy as well...."[110] The House Committee Report on Section 8 of the Clayton Act, which prohibited interlocking directorships, further evinced a concern for political democracy. It noted that "[t]he concentration of wealth, money and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions."[111]

3. The Two Clayton Act Amendments

Congress twice amended the Clayton Act. The first revision enacted was the Robinson-Patman Act (RPA) that amended section 2 of the Clayton Act. The evidentiary basis of the RPA was

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The U.S. Industrial Commission reported in 1900: "Among the causes which have led to the formation of industrial combinations, most of the witnesses were of the opinion that competition, so vigorous that profits of nearly all competing establishments were destroyed, is to be given first place." Quoted in Martin Sklar, "The Corporate Reconstruction of American Capitalism 1890-1916," Cambridge U.P. 56 (1988). Rudolph Peritz explores the conflicting ideologies of the Sherman Act debates in *supra* note 99.

[107] For an in-depth examination of the original Clayton Act and the 1950 amendments, see David Martin, MERGERS AND THE CLAYTON ACT, U. of Cal. (1958).

[108] Zephyr Teachout and Lina Khan, "Market Structure and Political Law: A Taxonomy of Power," 9 Duke J. of Const. Law & Pub. Pol. 1, 62 (2014). This is not to say that the FTC Act was not favorable to big business. It was largely the work of the National Civic Federation, a policy organization dominated by big business. James Weinstein, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900–1918, Beacon Press, (1968) at 6 ("Before the first World War, the Civic Federation was the most important single organization of the socially conscious big businessmen and their academic and political theorists.").

[109] Robert Lande and Sandeep Vaheesan, *supra* note 100 at 82–85. However, the final Clayton Act bill did not contain the exemption for labor that the American Federation of Labor sought. "The New York Times reported on February 2, 1914 that the president [Wilson] had let it be known that he would veto any antitrust measure that exempted labor from its provisions." Philip Foner, "History of the Labor Movement in the United States," 131 Vol. 5, International. Publishers (1980). As a result, there were thousands of labor injunction cases during the 1920s. William Forbath, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, 118 Harvard U.P. (1989).

[110] Id. at 83.

[111] Id.

the FTC "Final Report on the Chain Store Investigation" in 1934.[112] While the FTC report concluded that the chain stores were not monopolists because they competed among themselves, they did exercise undue buyer power. The chain store buyer power allowed the chains to obtain lower prices from manufacturers and farmers, which put smaller retailers at an unfair competitive disadvantage. The FTC found that, on average, chain grocery stores were able to underprice independents by 7.31%.[113] In 1935, Representative Wright Patman of Texas introduced the Patman Bill in the House, which would become the Robinson-Patman Act the next year. Patman described the purpose of the bill in the following way:

> This bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves, and the manufacturers from whom he buys, from exploitation by his chain competitor.[114]

Similarly, in the Senate debate, Senator Joseph Robinson of Arkansas posed the following question revealing the bill's concern:

> How long does the Senator think the little man, the little man, the independent dealer, would last if he were left to the mercy of the larger dealer…?[115]

Accordingly, the explicit purpose of the 1935 revision to the Clayton Act was to protect small business. That protection was not from monopoly power *per se* (indeed, the FTC expressly concluded that the chain stores were not monopolists), but instead from price discrimination benefitting a larger competitor with buyer power. The Robinson-Patman Act did not ignore the lower costs that a larger competitor might garner as a result of its size, however. It added a cost justification defense, allowing price differences up to the amount of the cost savings, but allocated the burden of proving such savings to the larger competitor.[116] Thus, it is evident that Congress was so concerned about protecting small businesses that an entire amendment was devoted to such protection.[117]

The second amendment to the Clayton Act occurred in 1950, when Congress passed the Celler-Kefauver Act. The Celler-Kefauver Act sought to close a loophole in the Clayton Act by

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[112] FTC, "Final Report on the Chain Store Investigation" (1934).
[113] Id. at 29.
[114] Earl Kintner and Joseph Bauer, Federal Antitrust Law, A Treatise on the Antitrust Laws of the United States, Anderson Pub. (1989) at 2933.
[115] Id. at 3117.
[116] Since the Robinson-Patman Act expressly authorizes price differences resulting from efficiencies of scale, its modern critics focus their criticisms on the Act's allocation of the burden of proof on big business to prove such efficiencies. See Mark Glick, David Mangum, and Lara Swensen, *supra* note 97 at 284.
[117] Id. (showing the authors' view on the purpose of the RPA).

expanding section 7's application to include mergers through stock acquisitions.[118] During the Celler-Kefauver Act debates, Congress made clear that it was concerned with economic concentration because, among other reasons, of its impact on political democracy.[119] Senator Kefauver articulated this concern when he said:

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.[120]

Thus, the weight of the evidence and academic scholarship supports the PCS view that the antitrust statutes evinced multiple social goals and were not limited to the extent advocated by the CWS. But, what about Supreme Court precedent? How do the two standards fare on that front?

C. Supreme Court Precedent

Until 1977, the words "consumer welfare" or "consumer surplus" never appeared in a Supreme Court opinion. The Supreme Court did frequently refer to price and output, but both the CWS and the PCS include lower prices as at least a goal of antitrust. The Supreme Court often also mentioned several of the other goals that appeared in Congressional legislative history, such as protecting small business and protection of the democratic process. In an early opinion just after the Sherman Act was enacted, *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897), Justice Peckham expressed his understanding that the Sherman Act was primarily about protecting small business:[121]

> In business or trading combinations they [trusts or similar arrangements] may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of

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[118] Thus, Congress effectively closed the exception created by the Supreme Court's decision in *Brown Shoe v. United States*, 370 U.S. 294, 313 (1962).

[119] Robert Pitofsky, *supra* note 98 at 1064 ("A striking feature of the legislative history of amended section 7 was the widely-shared perception of danger to the political well-being of the country and its citizens stemming from the merger movement.").

[120] Quoted in Robert Lande and Sandeep Vaheesan, *supra* note 100 at 84–86. Lande and Vaheesan assemble numerous statements with similar import during the 1950 Amendment's Congressional debate.

[121] See discussion in Harlan Blake and William Jones, *supra* note 21 at 423–424.

> many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital.[122]

Later Supreme Court cases expressed the opinions of several well-known justices concerning the goals of the Sherman Act. These statements included the goals of dispersion of economic and political power, and support for small business.[123] For example, in his dissent in the *Columbia Steel* case, Justice Douglas noted:

> The philosophy of the Sherman Act is that it [economic power] should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men…. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.[124]

And, in *United States v. Aluminum Co. of America*, Judge Hand expressly acknowledged that:

> [Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.[125]

In *Northern Pacific v. United States*, Justice Black writing for the Court summarized the goals of the Sherman Act this way:

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[122] 166 U.S. at 323–24. See also George Bittlingmayer, "Did Antitrust Policy Cause the Great Merger Wave," 28 J. of Law & Econ. 77, 86–92 (1985) (arguing that the early antitrust cases, including the *Trans-Missouri Freight* case, were important causes of the first great merger wave in the United States).

[123] See Stephen Martin, *supra* note 99 (collecting relevant quotations).

[124] United States v. Columbia Steel Co, 334 U.S. 495, 535 (1948) (William O. Douglas, dissenting).

[125] United States v. Aluminum Co. of America, 148 F. 2d 416, 427 (2d Cir. 1945), as quoted in Kenneth G. Elzinga, *supra* note 21 at 1203.

> 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. But even were the premise open to question, the policy unequivocally laid down by the Act is competition.[126]

Finally, Chief Justice Warren's construction of the goals of the antitrust laws in *Brown Shoe Co. v. United States* was as follows:

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.[127]

But things started to change once the Chicago School garnered more cachet. Since 1977, there have been at least seven Supreme Court cases flagged by antitrust scholars that arguably demonstrate a sea change in Supreme Court jurisprudence towards endorsing the CWS. While it is true that, after 1977, the Supreme Court mentions "consumer welfare" several times and does not refer to other goals, the actual antitrust analysis in those opinions is also compatible with the PCS. Accordingly, it is important not to conclude that, by making antitrust liability more difficult in the decades after 1977, the Supreme Court necessarily adopted the CWS. Higher burdens for plaintiffs are compatible with either standard. In our review of the cases, we do not find any clear evidence that the Court has abandoned its earlier focus on protecting the competitive process and carved out impenetrable safe harbors for conduct that increases consumer surplus. We therefore judge Supreme Court precedent, on balance, to be ambiguous on endorsement of either the CWS or the PCS.

In *Continental TV v. Sylvania*[128] in 1977, the Court held that vertical non-price territory restrictions should be analyzed under the rule of reason. The Court emphasized that "the market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[129] The Court reasoned that territorial restrictions can be a method to overcome "market imperfections such

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[126] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
[127] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).
[128] Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[129] Id. at 51–52.

as the so-called 'free rider' effect…."[130] This analysis is compatible with both the CWS and the PCS, and, therefore, is not indicative of the Court adopting either standard to the exclusion of the other. The Court was concerned with the impact of the restraint on interbrand competition, and it accepted the reduction in intrabrand competition because it removed a market imperfection.

A year later, the Court decided *National Society of Professional Engineers v. United States*.[131] The case involved whether a professional association of engineers could forbid competitive bidding by its members in order to prevent deceptive low bids that threatened public health and safety. Justice Stevens's majority opinion tracks the PCS approach. The Court states that "[t]he heart of our national economic policy long has been faith in the value of competition" and that all that matters in a rule of reason analysis is whether the practice promotes competition or suppresses competition.[132] Moreover, the Court said that the impact of competition cannot be in question. Competition therefore trumps other values, including efficiency.

Similarly, in *Leegin Creative Leather Products v. PSKS, Inc.*,[133] the Court overturned the *Dr. Miles* case and held that vertical price fixing should be analyzed under the rule of reason.[134] The analysis is similar to *Sylvania*. Justice Kennedy's majority opinion states that the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." [135] While this statement could be read as a narrowing of the goals of competition to the consumer's interest alone, the Court's actual analysis tracks a PCS approach. "Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intraband competition—the competition among retailers selling the same brand."[136] Like *Sylvania*, the increase in competition is accomplished by controlling free riders, a competitive process imperfection.[137] Accordingly, even though the opinion presents the trappings of the CWS, the actual analysis is also consistent with the PCS.

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[130] Id. at 56.
[131] 435 U.S. 679 (1978).
[132] Id. at 695.
[133] 551 U.S. 877 (2007).
[134] Einer Elhauge, "Should the Competitive Process Test Replace the Consumer Welfare Standard?" ProMarket, May 24, 2022.
[135] 127 S. Ct. 2705, 2713 (2007).
[136] Id. at 2715.
[137] Id.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.[138] is sometimes cited as evidence that the Court has adopted the CWS.[139] But in *Brunswick* the Court merely said that damages must be connected to the conduct that reduces competition. Nothing in the opinion signals the adoption of the CWS. Both the CWS and the PCS could be invoked to support the requirement that damages must be caused by the conduct that undermines the competitive process.

In *Reiter v. Sonotone Corp.*,[140] Chief Justice Burger's opinion for the Court asserts that the legislative history of the Sherman Act "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription.' R. Bork, *The Antitrust Paradox* 66 (1978)."[141] The Chief Justice provides no basis for his conclusory reading of the legislative history of the Sherman Act other than his citation to Judge Bork's book. While, on the one hand, it is significant that the majority opinion expressed support for Judge Bork's understanding of that history; on the other hand, the quotation played little role in the Opinion's conclusions. The issue in the case was whether Section 4 of the Clayton Act, which provides standing to a plaintiff to obtain damages when the plaintiff was "injured in his business or property," included retail consumers. The Court found that "property" of consumers is included in the meaning of the word "property" in Section 4 because when retail consumers overpay for goods and services they are injured in "property." The Court came to this conclusion by analyzing the words of the statute. The quote from Bork is contained in a paragraph where the Court merely says that nothing in the legislative history conflicts with the Court's holding.[142] It is therefore supportive dicta, not essential to the Court's holding.

In *NCAA*, Justice Stevens's majority opinion repeated the reference to Bork from the *Sonotone* case, and this has led some to see *NCAA* as another case endorsing the CWS. The case itself involved whether the NCAA restrictions on both price and availability of television contracts for college football games by its members could be justified under the rule of reason. The Court found that:

> Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[143]

The quotation from Justice Stevens has all the trappings of the CWS. It focuses on price and output, and quotes Bork about consumer welfare as the goal of the Sherman Act. However, as

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[138] 429 U.S 477 (1977).

[139] Roger Blair and D. Daniel Sokol, "The Rule of Reason and the Goals of Antitrust: An Economic Approach," 76 Antitrust L. J 471, 477 (2012).

[140] Reiter v. Sonotone Corp., et al., 422 US 330 (1979).

[141] Id. at 343.

[142] Id.

[143] National Collegiate Athletic Ass. v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 107 (1984).

Werden points out, further reference to responsiveness to consumer preferences is the key to the opinion. That statement suggests a focus on the competitive process because it implies that the problem with the NCAA plans was that they bypassed the competitive market. Werden reads this as rooted in the PCS rather than the CWS.[144]

The Supreme Court's 1993 decision in *Brooke Group* has also been cited as an example of the Court's acceptance of the CWS.[145] In *Brooke Group*, the Court formulated the essential elements for a predatory pricing case. They held that a successful predatory pricing claim requires proof of both pricing below some measure of incremental cost, as well as proof that the predator can recoup its investment in below-cost prices.[146] The Court reasoned that below-cost prices alone should not be sufficient to establish liability because low prices are an outcome of competition, and only when recoupment of the losses from the lower prices once the rival exits by higher prices is competition itself injured.[147] The reasoning is narrow, given the many ways predation can occur without sacrificing profits or recoupment in different markets. Other than being a pro-defendant holding, it is hard to see how the opinion bears on endorsement of either the CWS or the PCS standards, as the same conclusion can be obtained under either standard.

Finally, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,*[148] Justice Thomas's opinion for the unanimous Court extended the reasoning of *Brooke Group* to predatory bidding. Under the facts of the case, Weyerhaeuser overbid for lumber, driving Ross-Simmons, a competing sawmill, out of business. As in *Brooke Group*, the Court reasoned that high bids are part of the competitive process to procure inputs. There is no necessary profit sacrifice because input costs can often be passed on to consumers. The Court therefore required some proof that output prices did not rise. As the Court states, "only higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding."[149] In other words, Weyerhaeuser, incurring higher costs, would not be liable if it also raised its output price; that is, it would not be liable if it *decreased consumer surplus* in the output market, which is in obvious contradiction to the CWS.

In sum, after 1977, the Supreme Court has made establishing antitrust liability more difficult in a variety of situations. This does not necessarily distinguish between the CWS and the PCS, however. When the Court discusses goals of the antitrust laws it focuses on price and output, but it also never disavows earlier statements by the Court that articulated other goals. It

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[144] Gregory Werden, *supra* note 9 at 740.
[145] Brooke Group Ltd v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Einer Elhauge, *supra* note 134.
[146] Id. at 224.
[147] Id. at 225–226.
[148] 127 S. Ct. 1069 (2007).
[149] Id. at 1078.

sometimes has quoted Judge Bork and referred to consumer welfare, but the Court also consistently analyzes the impact of challenged conduct on competition, and it dependably states that the outcome of competition cannot be challenged under the antitrust laws. We therefore conclude that the Supreme Court has not unambiguously endorsed either the CWS or the PCS.

VI. The Connection of CWS and PCS to Economic Theory

In the prior section, we analyzed whether either the CWS or the PCS was conclusively endorsed by the antitrust statutes, their legislative history, or Supreme Court precedent, concluding that neither standard could claim unanimous endorsement. This section looks at the connection between economic theory and the two standards. Is one or the other standard more consistent with economic theory?

To understand how the two standards are tethered to economic theory, we differentiate between positive economic theory and normative economics. The positive economics used in antitrust involves primarily industrial organization models, together with other economic theories such as auction theory, which identify the equilibrium effects of potentially anticompetitive conduct. It also includes the economics of market definition and market power, and empirical analyses of corporate conduct. Both the CWS and the PCS rely on positive economic theories and empirical evidence from economics; neither is supported more than the other.

But what about normative economics? Normative economics involves issues about how policy can be justified and the criteria for recommending a policy change. The study of normative economics is called "welfare economics." "Welfare" refers to the well-being of humans at either the individual or social level. The latter is often referred to as "social welfare." Here the standards differ. The CWS, following Judge Bork, has adopted a specific theory of welfare based on the concept of consumer surplus. The PCS, in contrast, does not incorporate normative economics. It relies on legislative intent for its policy goals, and either assumes that the competitive process will further those goals, or, perhaps stated more precisely, defers to Congress's determination that the competitive process will further those goals. We now turn to a description of the relationship between the two standards and normative economics.

A. Welfare Economics and the CWS

As noted repeatedly above, the CWS is anchored in Judge Bork's understanding of social welfare as consumer surplus (or total surplus). Yet, since Judge Bork's original formulation, welfare economics has moved away from the economic surplus approach. To understand why, it is helpful to view Judge Bork's consumer welfare standard through the lens of developments

in the history of economic thought.[150] This will allow us to distinguish between consumer surplus, Pareto Efficiency, and Kaldor and Hicks' "New Welfare Economics." In the first part of this section, we discuss how Judge Bork adopted Marshall's notion of consumer's surplus. We then explain how consumer surplus cannot be derived from Pareto Efficiency, which is the economist's definition of efficiency. Finally, we explain that Kaldor and Hick's attempts to reformulate the theory of consumer's surplus resulted in failure.

1. Bork's Adoption of Marshall's Consumer's Surplus

Alfred Marshall introduced the concept of consumer surplus found in Judge Bork's *Antitrust Paradox* to the English-speaking world in his 1890 textbook.[151] Marshall stated that "[t]he excess of the price which he [a consumer] would be willing to pay rather than go without the thing, over which he actually does pay, is the economic measure of this surplus satisfaction. It may be called *consumer's surplus*."[152] Marshall's concept of consumer's surplus can be found in most introductory economics textbooks because of its simplicity. But like many introductory textbook concepts, it is subject to revision and limitations in scope in advanced economics classes. Marshall himself cautioned that his concept makes at least two assumptions: (1) it applies only when a single market is very small and (2) it assumes that consumer willingness to pay is independent of income or wealth.[153] Marshall knew that these assumptions do not apply in reality. For example, he wrote that "greater utility will be required to induce him to buy a thing if he is poor than if he is rich."[154]

2. Efficiency means Pareto Efficiency in Economic Theory

Marshall's welfare approach was met by skepticism among economists when it was introduced in 1890. In addition to the two problems above, economists were doubtful that Marshall's assumption that utility was cardinally measurable was scientific. In 1906, Alfredo Pareto published his *Manual of Political Economy,* which introduced the welfare concept of "Pareto Efficiency."[155] Under Pareto Efficiency, a policy change increases welfare if it benefits at least one individual and no individuals are harmed. Today when economists talk about "efficiency,"

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[150] The reason to use the lens of economic history is because it is a quirk of history that resulted in the coexistence of several normative concepts: consumer surplus from Marshall that can be found in introductory textbooks, Pareto optimality, and Kaldor and Hick's new welfare economics in graduate textbooks.
[151] Alfred Marshall, PRINCIPLES OF ECONOMICS, Macmillan (8th Ed. 1920).
[152] Id. at 124. Emphasis in the original.
[153] Id. at 130–31.
[154] Id. at 95.
[155] Vilfredo Pareto, MANUAL OF POLITICAL ECONOMY, Scholar (2014).

they mean Pareto Efficiency. For example, every leading graduate microeconomics textbook adopts this welfare framework.[156]

3. Consumer Surplus Can Not be Derived from Pareto Efficiency

Werden, following Mas-Colell et al., explains that maximization of social surplus leads to Pareto Optimality only under the following assumptions:[157] (1) the market under study must be so small that it cannot affect prices in any other markets; (2) consumers have quasilinear utility functions, which means that all consumers in the economy must consume that same amount of the good at issue[158]; and (3) there is a social planner who allocates wealth in the socially optimal way.[159] These assumptions may be interesting for mathematical exercises, but obviously they do not apply in the real world.[160]

4. Kaldor and Hicks's New Welfare Economics Also Fails to Support Bork's Consumer Surplus

The problem with Pareto Efficiency is that few policy decisions involve an absence of losers, as is required for Pareto Efficiency. This limitation led John Hicks in 1943 to reformulate Marshall's original concept of consumer's surplus, eliminating Marshall's assumption that

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[156] For example, Mas-Colell et al., *supra* note 83, 307–309 (and all other places in that book except for the use of "productive efficiency" at 150); Hal Varian, MICROECONOMIC ANALYSIS 226–27 (3rd ed. 1992); Geoffrey Jehle and Philip Reny, ADVANCED MICROECONOMIC THEORY 186 (3rd ed. 2011).

[157] Gregory Werden, *supra* note 9 at 714–715, 717 especially footnote 15 (2014); Gregory Werden, "Essays on Consumer Welfare and Competition Policy," SSRN, March 2009. Technically, surplus maximization implies *maximization of a social welfare function* under the three assumptions given. Since any Pareto Optimal point is the maximum of *some* social welfare function (after all, if an allocation is not the maximum of *any* social welfare function, it is not Pareto Optimal because Pareto improvements must exist), under the three assumptions, any Pareto Optimal point can be achieved via surplus maximization.

[158] Mas-Colell et al., supra note 83, contains the following results. Page 50, the definition of quasilinear preferences: "a continuous [preference relation] $\succcurlyeq$ on $(-\infty, \infty) \times \mathbb{R}_{+}^{L-1}$ is quasilinear with respect to the first commodity if and only if it admits a utility function $u(x)$ of the form $u(x) = x_1 + \phi(x_2, \dots, x_L)$. Page 97, 3.D.4(a), showing that with quasilinear preferences, the demand for the non-numéraire goods does not depend on wealth (or on income, depending on whether the consumer's expenditure is constrained by wealth or by income): "…assume that preferences are strictly convex and quasilinear…[then] the Walrasian [or "Marshallian"] demand functions for goods $2, \dots, L$ are independent of wealth [or of income]." With these preferences, an increase in income of $1 is spent entirely on good 1, the numéraire good; none of it is spent on any other good. If the (fixed) expenditures on the non-numéraire goods are greater than the consumer's income, the quantity of the numéraire good purchased is negative (hence the domain for the first coordinate of the preference relation is $(-\infty, \infty)$ rather than the expected $[0, \infty)$), which is obviously unrealistic. Page 83: "…if there is no wealth [or "income"] effect for [a] good (e.g., if the underlying preferences are quasilinear with respect to some [other] good), the CV and EV measures are the *same*…. In the case of no wealth effects, we call the common value of CV and EV…the change in *Marshallian consumer surplus*" (emphasis in the original). The corresponding necessity "(only if") result is, like the sufficiency result, due to W. M. Gorman, "On a Class of Preference Fields," 13 Metroeconomica 53 (1961).

[159] Mas-Colell et al., *supra* note 83 at 328.

[160] See discussion in Mark Glick, Gabriel A. Lozada, Pavitra Govindan and Darren Bush, "The Horizontal Merger Efficiency Fallacy," 96 Temple L. Rev. 571, 597–602 (2024).

utility was cardinally measurable.[161] Hicks's reworking replaced consumer surplus with the concepts of "compensating variation" (CV) and "equivalent variation" (EV). These measures are cardinal (specifically, dollar) measures, like Marshall's consumer surplus, even though CV and EV do not depend on cardinal utility. Without going into detail, it can be shown that Marshall's consumer's surplus is bounded above and below by these two measurements. This is the basis for what is referred to as the "new welfare economics." However, problems quickly arose. Because Hicks offered *two* measures of value, it was shown that when applied to policy decisions the two criteria could conflict, or lead to reversals (in which the criteria recommend a policy, but when it is adopted, the criteria then recommend that it be reversed). To avoid these inconsistencies, Gorman showed that there must be an unrealistic restriction on consumer consumption, namely the assumption of quasilinear utility mentioned earlier. Consumers must consume the same amount of different goods regardless of changes in income. So, if at $100 a week a consumer buys a $10 pizza, then at $100,000 a week he/she must still buy one $10 pizza.[162] Moreover, several other inconsistencies emerged that rendered the New Welfare Economics model untenable.[163] These problems led prominent welfare economists John Chipman and James Moore to conclude that "the new welfare economics must be considered a failure."[164] And in the opinion of Nobel laureate Angus Deaton, "there is no valid theoretical or practical reason to ever integrating under a Marshallian demand curve" (note that consumer surplus *is* the integration under the Marshallian demand curve).[165] This is the basis for our statement at the start of this section that welfare economists have moved away from the economic surplus approach sponsored by Judge Bork.

Some antitrust practitioners believe that Robert Willig addressed the problem of the potential inconsistency between EV and CV in his paper "Consumer's Surplus Without Apology."[166] Willig is sometimes referred to for the proposition that the difference between EV and CV is so small as to be unimportant. But, as we have pointed out in an earlier paper, some of Willig's results are inconsistent with his thesis: they sometimes imply that the difference between EV and CV is actually quite large.[167]

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[161] John Hicks, "The Rehabilitation of Consumers' Surplus," 8 Rev. Econ. Stud. 108 (1940–1941).
[162] See *supra* note 158.
[163] Mark Glick, Gabriel Lozada and Darren Bush, "Antitrust's Normative Economic Theory Needs a Reboot," 54 Int. J. of Pol. Econ. 1, 17-30 (2025).
[164] John Chipman and James Moore, "The New Welfare Economics 1939–1974," 19 Int. Econ. Rev. 547, 548 (1978).
[165] Marco Becht, "The Theory and Estimation of Individual and Social Welfare Measures," 9 J. of Econ Surveys 53, 77 (1995) (quoting Angus Deaton).
[166] Robert Willig, "Consumer's Surplus Without Apology," 66 Am. Econ. Rev. 589 (1976).
[167] See discussion and references in Mark Glick, Gabriel A. Lozada, and Darren Bush, "Why Economists Should Support Populist Antitrust Goals," 2023 Utah L. Rev. 769, 802–806 (2023).

5. The Role of the Potential Pareto or Kaldor Hicks Compensation Criterion

When using EV or CV or surplus to evaluate a policy, the standard cost-benefit practice is to simply add up the EV's or CV's or surpluses of every individual, then adopt the policy if the sum is positive, that is, if the positive EV's or CV's or surpluses are greater than the negative ones. This decision-making criterion is called the "Potential Pareto" criterion or the "Compensation Principle," and it was first formulated by Kaldor. It is called "Potential Pareto" because, under this criterion, if all the losers were compensated there would still be some benefit left-over. However, it is also true that no losers actually have to be compensated. Thus, there will usually be losers. In an extreme case, there could be only one big winner and everyone else could be a loser. In response to this criticism, some have argued that because of randomness, on average one is likely to be a winner somewhat more often than to be a loser if the society uses Potential Pareto as a decision-making criterion for multiple decisions. This is not true, however, as explained in the paragraph after next.

The distributional implications of using EV or CV or surplus to make public policy decisions has been the topic of unrelenting criticism by welfare economists.[168] With regard to "normal" goods (those where demand rises when income or wealth rises), rich people will always have more EV, CV, and consumer surplus because they have more income or wealth. Simply summing these variables automatically gives rich people more influence than poor people in decisions, leading to ethically questionable conclusions. [169]

Because of this, each time society uses Potential Pareto to make a decision, on average rich people will become better off and poor people will become worse off. Therefore, when the society uses Potential Pareto as a decision-making criterion for multiple decisions, the winners and losers are not random: the poor will become progressively worse off.[170]

The authors are not aware of any acknowledgment or defense of these problems by advocates of the CWS. Indeed, to the extent that CWS is based on consumer's surplus from Marshall, the consensus among welfare economists is that the CWS is a deeply flawed tool for making social decisions. It may be possible to better align the CWS with results from welfare economics, but this has yet occurred.

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[168] Joseph Farrell and Michael Katz, *supra* note 5 at 9. See references and discussion in Mark Glick, Gabriel A. Lozada, and Darren Bush, *supra* note 167 at 781.

[169] Lucian Bebchuk, "The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?" 8 Hofstra L. Rev. 671 (1980); Zachary Liscow, "Is Efficiency Biased?" 85 U. Chi. L. Rev. 1649 (2018).

[170] Brad Hackinen, "Does Repeated Application of the Kaldor-Hicks Criterion Generate Pareto Improvements?" University of Victoria Department of Economics Undergraduate Honours Thesis (2012). https://www.uvic.ca/socialsciences/economics/assets/docs/honours/Hackinen.pdf

B. The PCS and Economic Theory

The PCS does not rely on normative economic theory to establish antitrust goals. Rather, as detailed in Section II above, it takes its goals from the Congressional legislative intent when the antitrust statutes were enacted. It also does not utilize an economic definition of competition. For the PCS, competition takes its dictionary definition as rivalry. In contrast, in economics, competition means "perfect competition," where rivalry is absent and firms are price takers and have no control or influence over price and output. Indeed, the economic conception of competition "is highly impersonal and there is actually an absence of active rivalry between individual market participants."[171] Indeed, sometimes PCS advocates will go so far as to claim that the PCS is in opposition to economics as a whole. But this is a false narrative; the PCS uses positive economic theory for its analysis of both structure and conduct in antitrust cases.

We conclude from our brief summary that both the CWS and the PCS accept positive economic theories of firm conduct and market power, and neither standard is faithful to normative economic theory. The big difference is that the CWS aspires to incorporate normative economic theory to replace Congressional goals, but has not successfully done so. Indeed, so far, its rendition of normative economic theory has not incorporated the analyses of prominent welfare economists.

VII. Social Welfare and Goals Advanced by the CWS and the PCS

The CWS has a single goal: greater consumer (or social) surplus. Particularly if the goal is greater consumer surplus, the goal will be achieved if there is greater output, and so the CWS often becomes, in practice, an output goal. In this section we evaluate whether the single CWS goal, or the much broader traditional Congressional goals embraced by the PCS, are better suited to increase social welfare. Since the PCS also includes greater output as a goal, we consider only the other Congressional goals in evaluating the social welfare potential of the PCS.

A. The CWS Output Goal

For the CWS, the primary goal of antitrust enforcement is greater surplus, and when the kind of surplus considered is restricted to be consumer surplus, the goal is achieved when output is expanded. To the extent a broader view of surplus is advocated, the CWS is consistent with a goal of greater labor surplus as well, and that occurs when the quantity of labor used expands.

One way to judge how an economic variable affects well-being is by reference to its impact on population happiness. Happiness research often involves surveys of self-reported feelings of

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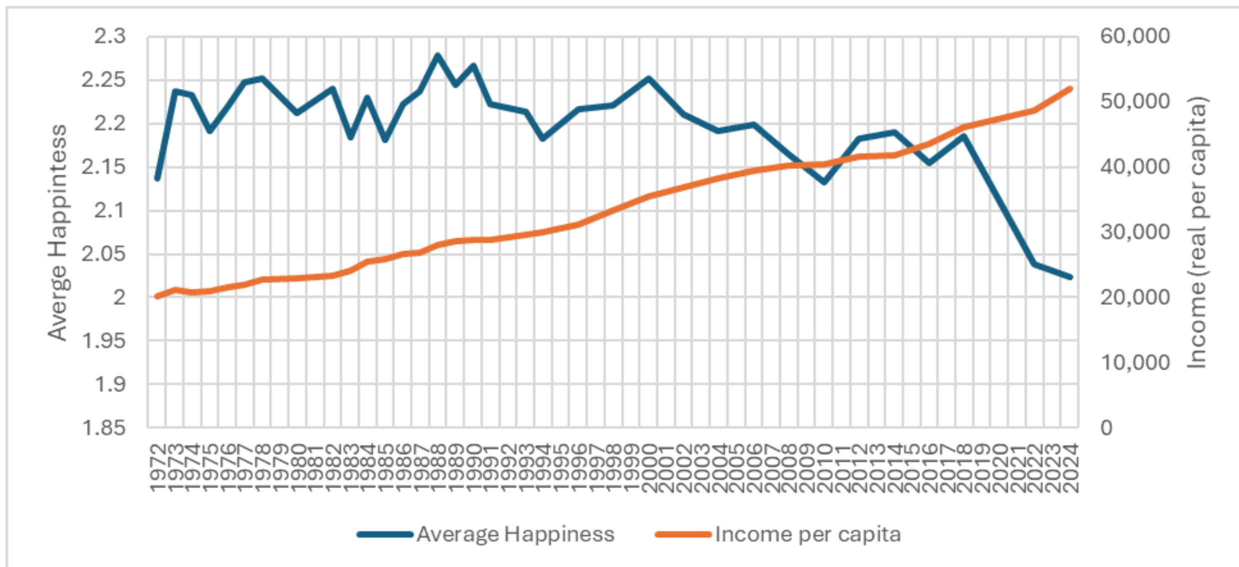
[171] Roger Blair and David Kaserman, ANTITRUST ECONOMICS (2nd ed), Oxford (2009) at 8.

happiness or well-being conducted by social scientists or epidemiologists on a large scale and across countries. Importantly, however, happiness research consistently shows that greater output in developed countries does not increase national happiness. Using survey data, in 1974, economist Richard Easterlin was the first to show that happiness in the United States had a basically flat trend since 1946, while GDP per capita was growing quickly.[172] This is known as the "Easterlin Paradox." Psychologist Ed Diener and coauthors studied happiness and after-tax disposable income growth from 1946 to 1989 and found that, while income was growing, happiness was not.[173] Two economists with the Federal Reserve Bank of St. Louis did a study using data from the 1972–2008 period and came to the same conclusion.[174] In the figure below we extend their time period to 2024.[175]



In the 2018 survey, average U.S. happiness was 2.19, but in the next survey, 2022, it plunged to 2.04, well below any previous year in the dataset. The COVID-19 pandemic played a role in

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[172] Richard Easterlin, "Does Economic Growth Improve the Human Lot? Some Empirical Evidence," in Paul A. David and M.W. Reder, eds., NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOUR OF MOSES ABRAMOVITZ, Academic Press (1974). Easterlin quotes Abramovitz, who wrote "we must be highly skeptical of the view that long-term changes in the rate of growth of welfare can be gauged even roughly from changes in the rate of growth of output."

[173] Ed Diener, Eunkook Suh, Richard Lucas, and Heidi Smith, "Subjective Well-being: Three Decades of Progress," 125 Psychological Bulletin 276 (1999) at 288.

[174] Ruben Hernández-Murillo and Christopher Martinek, "The Dismal Science Tackles Happiness Data," The Regional Economist, St. Louis Federal Reserve (Jan. 2010) 14–15.

[175] As Hernández-Murillo and Martinek did, we also code "not too happy" as 1, "pretty happy" as 2, and "very happy" as 3. We use happiness data from the General Social Survey, https://gssdataexplorer.norc.org/trends?category=Gender%20%26%20Marriage&measure=happy&Measure%20Category=Very%20happy&Breakdown%20Label=Total, and economic data from U.S. Bureau of Economic Analysis, Real Disposable Personal Income: Per Capita [A229RX0A048NBEA], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/A229RX0A048NBEA, January 28, 2026. The following years are missing: 1979, 1981, 1992, and all odd years after 1993. The year 2020 is also missing.

that, but U.S. happiness fell further in 2024, after the bulk of the pandemic was over.[176] Meanwhile, income per capita rose in those three observations at a compound annual rate of 2.1%, which is higher than its 1.8% rate for the entire period. 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."[177] Bruno Frey shows that this same relationship holds for the United Kingdom, Belgium, and Japan.[178]

Easterlin reasoned that happiness is mainly related to relative income, not absolute income. As the economy grows, relative positions may not change. In the United States, GDP has been growing alongside increasing income inequality. In a society where happiness is related to relative income, happiness will fall as inequality rises if "the marginal increase in happiness when income rises" is higher for lower-income people than for higher income people. This is essentially the same assumption made by most economists in the days of cardinal marginal utility theory.

Higher GDP is also only weakly related to greater longevity. Once an economy achieves a higher level of development, higher GDP results in little increase in lifespan. The following is Figure 8.1, "Life expectancy levels off at higher levels of economic development," from epidemiologists Richard Wilkinson and Kate Pickett's book *The Inner Level*:[179]

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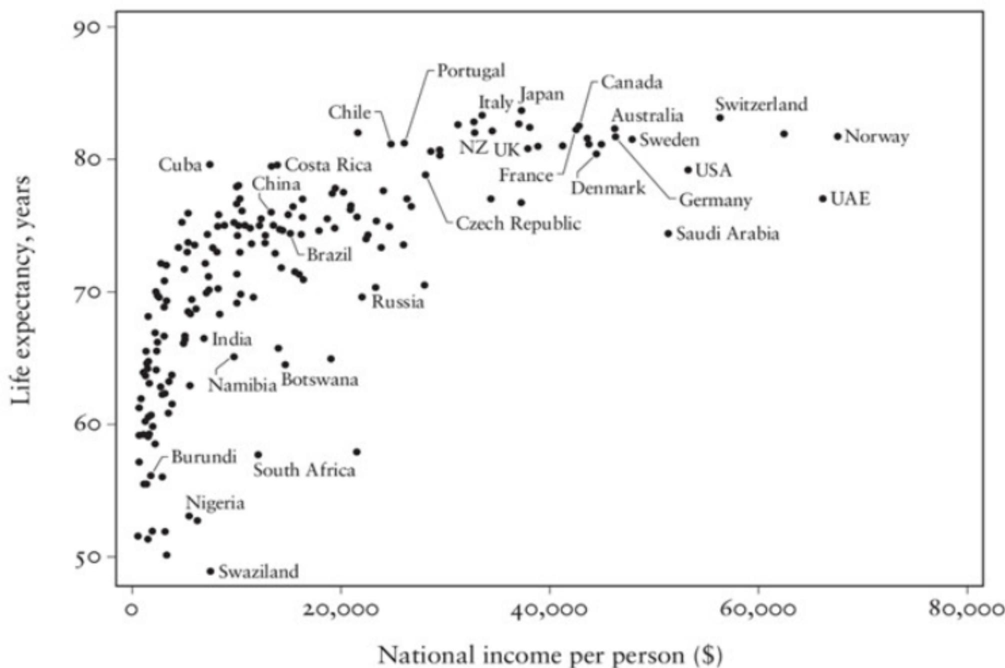
[176] U.S. "Deaths Attributed to COVID-19 on Death Certificates": 2020 were 385,676; 2021 were 463,267; 2022 were 247,186; 2023 were 76,053; 2024 were 47,539; and 2025 were 20,623. U.S. Centers for Disease Control and Prevention, https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm.

[177] Richard Layard, "Happiness and Public Policy: A Challenge to the Profession," 166 Econ. J. 510 (2006).

[178] Bruno Frey, HAPPINESS: A REVOLUTION IN ECONOMICS, MIT Press (2010) at 38–41.

[179] Richard Wilkinson and Kate Pickett, THE INNER LEVEL: HOW MORE EQUAL SOCIETIES REDUCE STRESS, RESTORE SANITY AND IMPROVE EVERYONE'S WELL-BEING, Penguin (2019) at 226. For more information on the inequality of life expectancy within the U.S., see for example Steven H. Woolf, "Understanding Disparities in Life Expectancy," 404 The Lancet 2243 (2024). https://doi.org/10.1016/S0140-6736(24)02136-6.



The graph shows that, as countries develop, national income per person has a diminishing impact on life expectancy.[180] One caveat to dismissing the effect of greater GDP on happiness in rich countries is that greater output decreases unemployment, and while unemployment only affects a small portion of the population in a developed country, unemployment stands out as one of the most significant factors that negatively impacts self-reported subjective well-being.[181] Greater output may also be related to other factors that directly influence well-being and future research may uncover such relationships.

Thus, it is clear that the CWS's unitary focus on maximizing consumer surplus has little potential alone to increase social welfare as measured by people's subjective feelings of happiness or life expectancy. But, what about the PCS's broader goals taken from the legislative intent behind the antitrust laws: Do they have the potential of directly materially advancing social welfare? It is to that question that we now turn.

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[180] A similar point of view is expressed by Steven Woolf in the following two-part interview: Lynn Parramore, "Why American Life Expectancy is Falling Behind Globally, Falling Apart by State," available at https://www.ineteconomics.org/perspectives/blog/why-american-life-expectancy-is-falling-behind-globally-falling-apart-by-state, and "America's Real Health Crisis? Economics—and a Generation Pays," available at https://www.ineteconomics.org/perspectives/blog/americas-real-health-crisis-economics-and-a-generation-pays.

[181] Id. at Chapter 4; Bruno Frey, *supra* note 178 at 46; Andrew Clark and Andrew Oswald, "Unhappiness and Unemployment," 104 Econ. J. 648 (1994).

B. The PCS Goals of Reducing Income Inequality, Protecting Small Business, and Dispersing Economic and Political Power.

In addition to having increased output as a goal, the PCS also incorporates other goals from the legislative history of the antitrust statutes. In this section we report on the empirical welfare results of reducing income inequality, protecting small business, and fostering democracy.

1. Reducing Income Inequality

One of the most important factors affecting social welfare is income inequality. The PCS emphasized that one Congressional goal of antitrust was to reduce income inequality by limiting corporate power.[182] It is arguable that the CWS's focus on maximizing output also tends to reduce income inequality—greater output (supply) lowers prices and lower prices also limit corporate rents, which could reduce inequality—but that result is consequential, not intentional (as with the PCS), and is by no means guaranteed.

In their book *The Spirit Level*, Wilkinson and Pickett present extensive empirical evidence across countries and across U.S. states demonstrating that income and wealth inequality has strong negative effects on factors that contribute to social welfare. For example:

Increased income inequality reduces social trust as measured by survey evidence.[183]

Increased income inequality is associated with higher homicide rates.[184]

Increased income inequality is associated with lower rates of social mobility.[185]

Increased income inequality is associated with lower math and literacy scores for children.[186]

Increased income inequality is associated with higher adult and childhood obesity levels.[187]

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[182] Lina Khan and Sandeep Vaheesan, "Market Power and Inequality: The Antitrust Counterrevolution and its Discontents," 11 Harv. L. & Pol'y Rev. 235 (2017).

[183] Richard Wilkinson and Kate Pickett, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER, Bloomsbury, (2011) at 52–53, 56. Andre Albertazzi, Patrick Lown and Friederike Mengel, "Income Inequality and Social Trust," 257 Econ. Letters 112675 (2025).

[184] Id. at 148–149. H. Krahn, R. F. Hartnagel, and J.W. Gartrell, "Income Inequality and Homicide Rates: Cross-National Data and Criminological Theories," 24 Criminology 269 (1986).

[185] Id. at 160–161. See also Raj Chetty, Nathaniel Hendren, Patrick Kline, Emmanuel Saez, and Nicholas Turner, "Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility," 104 American Economic Review 141; Abigail Begashaw, "Income Inequality and the Erosion of Social Mobility," Kennesaw State Univ. Working Paper (2025), https://www.kennesaw.edu/coles/centers/markets-economic-opportunity/docs/begashaw-2025.pdf.

[186] Id. at 106-107; Joseph Workman, "Inequality Begets Inequality: Income Inequality and Socioeconomic Achievement Gradients across the United States," 107 Soc. Sci. Res. 102744 (2022).

[187] Id. at 92–94; Hossein Zare, Khushbu Balsara, Nicholas S. Meyerson, Paul Delgado, Benjo Delarmente, Rachael McCleary, Roland J. Thorpe Jr., and Darrell J. Gaskin, "Exploring the Association Between Minimum

Increased income inequality is associated with greater mental illness and greater drug use.[188]

Increased income inequality is associated with lower life expectancy and higher infant mortality.[189]

Collectively, the evidence is compelling that income inequality degrades social welfare by negatively affecting many of the factors that social scientists have identified as important for social welfare, including health, education, life expectancy, social trust, and social mobility.

2. Protecting Small Business

Another Congressional goal of the antitrust laws is protecting small business. Some studies have positively linked self-employment to job satisfaction.[190] For example, one multi-national study found that self-employment contributes to happiness in twenty-three of twenty-five European countries.[191] Eric Posner notes the high levels of support small businesses receive from ordinary citizens:

> Unlike economists, ordinary Americans support small businesses because of their (real or imagined) role in the texture of everyday life rather than strictly on the basis of prices and output. They also admire the people who start small businesses, perhaps because owners are, or seem, more independent and autonomous, less servile and dependent, than employees.[192]

In addition, some empirical evidence supports the common belief that small businesses contribute to the foundations of local culture and economies where they are located.[193]

3. Fostering Democracy

There is also substantial evidence that the Congressional antitrust goal of dispersion of political and economic power is also an important contributor to social welfare. Some economists argue that political democracy is a prerequisite for successful growth and innovation. For example, Daron Acemoglu and James Robinson identify inclusive economic and political institutions as

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Wage Policy, Income Inequality and Obesity Rates in U.S. Counties," 12 J. of Racial and Ethnic Health Disparities 4173 (2025).

[188] Id. at 67, 69, 71; Wagner Riberto, et al., "Income Inequality and Mental Illness-Related Morbidity and Resilience: A Systematic Review and Meta-Analysis," The Lancet: Psychiatry (2017).

[189] Id. at 82–83; Eric Neumayer and Thomas Plumper, "Inequalities of Income and Inequalities of Longevity: A Cross-County Study," 106 Am. J. Pub. Health 160 (2016).

[190] Bruno Frey, *supra* note 178 at 72; Matthias Benz and Bruno Frey, "Being Independent is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy," 75 Economica 362 (2008).

[191] Stefan Schneck, "Why the Self-Employed are Happier: Evidence from 25 European Countries," 67 J. Bus. Res. 1043 (2014).

[192] Eric Posner, *supra* note 29 at 234.

[193] Stacy Mitchell, Big-Box Swindle: The True Cost of Mega-Retailers and the Fight for America's Independent Business, Beacon (2006) at 33–36.

the most prominent common element of successful economies. They argue that, absent political democracy, powerful corporate interests innovate less and instead increase profits through rent seeking and externalizing costs. The authors describe their central findings as follows:

> Central to our theory is the link between inclusive economic and political institutions and prosperity. Inclusive economic institutions that enforce property rights, create a level playing field, and encourage investments in new technologies and skills are more conducive to economic growth than extractive institutions.…[194]

Political democracy is also directly related to increased happiness. Several studies have shown that people living in democratic countries are happier, even controlling for income and other factors. According to Frey, "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 authoritarian countries."[195]

We conclude that there is at least some evidence that all the Congressional goals of antitrust stressed by the PCS increase social welfare. By far the most important and most studied determinant of social welfare in the developed economies is income inequality. Supporters of the PCS have directly called for antitrust enforcement to help address income inequality. The goals of the CWS also indirectly limit income inequality to some extent when they limit monopoly power. But for the CWS, competition may have to give way when conduct that limits competition can be claimed to increase consumer surplus.

VIII. CONCLUSION

We have compared the CWS and the PCS across multiple dimensions and have found that they have large areas of overlap. Both focus on the competitive process, but the CWS constructs exceptions or safe harbors for conduct that may increase consumer surplus. Important areas of conflict involve the efficiency defense in merger analysis, and procompetitive justifications in restraint of trade or monopolization cases analyzed under the rule of reason. The PCS is more faithful to both the plain meaning of the antitrust statutes and the legislative history of these statutes. However, we found that Supreme Court precedent since around 1977 is ambiguous in its endorsement of either standard. Both standards accept positive economic theory for assessing issues such as market power and relevant markets, and neither standard is consistent

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[194] Daron Acemoglu and James Robinson, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY, Crown Currency (2013) at 430. Fred Block argues the same point, that political democracy is important for growth because it prevents powerful firms from using political power to seek profits through rent seeking and externalizing costs on to workers, consumers, and citizens. See Fred Block, CAPITALISM: THE FUTURE OF AN ILLUSION, (Univ. Cal.) (2018).

[195] Bruno Frey, *supra* note 178 at 64.

with normative welfare economics. While some, but not all, CWS supporters claim that the CWS is rooted in welfare economics, the PCS supporters do not make such claims. Finally, we demonstrated that the most important factor influencing social welfare in developed countries today is income inequality, alleviation of which the PCS advocates for directly and the CWS improves only indirectly via its output goal, but harms via its use of the Potential Pareto criterion. Other PCS goals, such as supporting small business and dispersion of economic and political power, also seem to have an independent, positive effect on social welfare. Increasing output contributes to social welfare, particularly if one ignores its environmental effects and its effects on the amount of non-working hours, but increased output appears not to be as potent as reducing income inequality is in enhancing social welfare in developed economies. It is our sincere hope that better understanding the differing foci and utilities of the CWS and the PCS in antitrust analysis will assist policy makers, courts, and antitrust practitioners to better select from among and apply these standards in a more informed and intentional manner.