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The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?

Testimony before the
Senate Committee on the Judiciary:
Subcommittee on
Antitrust, Competition, and Consumer Rights

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December 13, 2017

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INTRODUCTION

In 1978, Robert Bork published the *Antitrust Paradox*. In that book, Bork contended that the main goal of antitrust enforcement should be to promote "consumer welfare"[1] and that the main way to achieve that goal was to promote "business efficiency."[2]

In January 1984, Assistant Attorney General for Antitrust, J. Paul McGrath, in his first speech in office, embraced "consumer welfare."[3] In June 1984, McGrath published new "Merger Guidelines" that detailed how the Reagan Administration planned to understand and enforce America's vast body of antimonopoly law.[4] Among the changes—executives from merging corporations would be allowed to defend their deals on the grounds that they would create greater "efficiencies."[5]

The idea that the enforcement of America's antimonopoly laws should promote the "welfare" of the "consumer" seems innocuous enough. So too the idea that corporations should be allowed to realize whatever "efficiencies" that will improve their ability to serve "consumers." Yet, in fact, these changes marked the adoption of a new philosophy of competition policy, and a new approach to enforcing America's antimonopoly laws, both of which were radically at odds with the first two centuries of American history.

Together, these changes cleared the way for three decades of corporate concentration that has remade almost every corner of the U.S. political economy. This in turn has resulted in a wide variety of effects deeply harmful to businesses, workers, and consumers, effects that increasingly threaten basic balances in our society and our political system. The "Consumer Welfare" philosophy, meanwhile, continues to this day to blind many of America's brightest legal and economic scholars to both the extent of the concentration, and to many of the resulting harms, including those most threatening to our society and democracy.

AMERICAN ANTIMONOPOLY—FROM THE FOUNDING TO BORK

It might seem the best place to start any history of American antimonopoly law is 1890, with passage of the Sherman Antitrust Act. But to truly understand America's antimonopoly tradition, we have to go back to the Founding.

Consider the Boston Tea Party of 1773. Most histories tell us the Tea Party was a rebellion against unfair taxation, and this was true in part. But if we read the letters of Sam Adams and

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[1] Robert Bork (1978). *The Antitrust Paradox*, p. xi.

[2] Ibid, p. 7.

[3] https://www.upi.com/Archives/1984/01/12/The-nations-new-antitrust-chief-J-Paul-McGrath-went/9589442731600/

[4] Department of Justice, *Merger Guidelines* (1984).

[5] Ibid.

John Hancock, we see something else as well. Adams and Hancock did not want an intermediary—in this case the British East India Company—between the citizen as a producer of goods and ideas, and the citizen as a buyer of those goods and ideas.

What they wanted, Adams and Hancock wrote, was "liberty" to deal directly with one another, in open markets, without any giant corporation or government regulating that interaction.[6]

After the Revolution, members of the Founding generation began to buttress this simple idea of liberty with two antimonopoly concepts designed to promote a more well-balanced and extensive democracy in America. One was that citizens should be, to as great a degree as possible, economically independent. The second was that there be rough economic equality among citizens. As James Madison wrote in 1792:

> *The class of citizens who provide at once their own food and their own raiment, may be viewed as the most truly independent and happy. They are more: they are the best basis of public liberty, and the strongest bulwark of public safety. It follows, that the greater the proportion of this class to the whole society, the more free, the more independent, and the more happy must be the society itself.*[7]

Madison made clear he viewed this not merely as smart policy, but as a fundamental right:

> *That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.*[8]

Over the coming decades, antimonopoly law became a prime means of extending the system of checks and balances into the realm of political economy. It did so largely by focusing on protecting the rights of the citizen in his or her capacity as a producer—as a grower or maker of things, as a seller of services, and as a worker bringing labor to market.

Over time, Americans came to understand that their antimonopoly laws and policies, in addition to protecting their liberties and their democracy, also helped them to preserve the independence of their communities and their individual and common prosperity, such as by protecting the true innovator from corporate power.

Many Americans believed the Civil War would mark the final triumph of the people over monopoly. This was true of the act of freeing of the slaves from monopoly control over their lives and labor. It was also true of the act of breaking the system of land monopoly on which the plantation system had rested. Congress boosted these efforts during and after the war with new

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[6] http://www.masshist.org/teaching-history/resources/blackington/john_hancock.pdf

[7] James Madison, *Republican Distribution of Citizens*. Volume 1, p. 680, (1792). http://press-pubs.uchicago.edu/founders/print_documents/v1ch18s28.html

[8] James Madison, *Property*. (1792). http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html

policies explicitly designed to advance the spread of small-scale property owners, with a prime example being the Homestead Act of 1862.

Yet the very concentration and centralization of economic power needed to win the Civil War disrupted many traditional balances, and by the 1870s monopolists were on the march across America, ushering in what Mark Twain dubbed "The Gilded Age."[9]

During and after the Civil War, the Federal Government passed telegraph and banking laws that can properly be understood as antimonopoly laws. But it was only with the passage of the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890 that Americans saw a clear vision of antimonopoly philosophy attached to a federal-level antimonopoly law.

Senator John Sherman, author of the 1890 Act, made the clearest statement, in a speech defending his bill. In a direct echo of James Madison, Sherman said that the goal of antimonopoly is to promote independence and a rough equality:

> *It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty, and lies at the foundation of the equality of all rights and privileges.*[10]

But for the next two decades, the new federal antitrust laws had little effect on corporate monopoly. The people notched a few important victories, but corporations and banks generally became vastly more powerful. By 1910 the so-called "trust buster," Theodore Roosevelt, had given up and in a famous speech he delivered in Osawatomie, Oklahoma, he adopted a radically new approach to addressing monopoly:

> *Combinations in industry are the result of an imperative economic law which cannot be repealed by political legislation. The effort at prohibiting all combination has substantially failed. The way out lies, not in attempting to prevent such combinations, but in completely controlling them in the interest of the public welfare.*[11]

The presidential election of 1912 was the one of the most important public discussions in American history about whether and how to address the power of monopoly. Running as a candidate of the Progressive Bull Moose party, Roosevelt largely continued to preach his command-and-control statist answer to the problem. In direct contrast, New Jersey Governor Woodrow Wilson and his mentor Louis Brandeis, said such concentration of control in the hands of a few corporations, and the government, would lead to "autocracy" and "tyranny."[12]

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[9] https://www.gutenberg.org/files/3178/3178-h/3178-h.htm

[10] *Cong. Rec.,* 21:3 (21 Mar. 1890), p. 2460.

[11] http://teacher.sdhsd.net/tpsocialsciences/us_history/progressives/new_nat.htm

[12] Woodrow Wilson (1912). *The New Freedom*, p. 28

"The government," Wilson said, "which was designed for the people, has got into the hands of bosses and their employers, the special interests. An invisible empire has been set up above the forms of democracy."[13] The answer, Wilson told voters, lay in making antimonopoly law actually work, and using it to reestablish a system of truly open and competitive markets in America. Wilson and Brandeis called their philosophy "The New Freedom."

Once in office, President Wilson moved swiftly to update American antimonopolism for the industrial era, and within the first 14 months of his administration had pushed through the Clayton Antitrust Act, the Federal Trade Commission Act, and the Federal Reserve Act. Together these fixed most of the basic flaws of the Sherman Act.

Working on this foundation, Americans of both parties over the next few years developed a clear and practical approach to antimonopoly law. The approach was based on Madison's principles, but also embraced fully the promises of 20th Century science and technology, including large-scale mass manufacturing and network monopolies such as the telephone and electricity.

Americans achieved this balance in large part by separating competition policy into three distinct but coordinated approaches.

In the case of network industries, like transportation, communications, and other "natural monopolies," they held that the public must directly own the corporation or regulate its actions. They also held that such network monopolies must be neutralized, which they achieved by using various forms of antimonopoly law to impose rules against first-degree price discrimination and to prohibit vertical integration so as to avoid conflicts of interest.

In the case of industrial activities, like manufacturing cars or chemicals, citizens accepted high degrees of vertical integration and concentration of capital, but also insisted that all such corporations compete with at least three or four other large corporations making the same products.

In the case of all other sectors of the economy, such as retail, farming, light manufacturing, and banking, the aim was to promote as wide a distribution of power and opportunity as possible by preventing concentration almost everywhere.

To achieve this hybrid antimonopoly aim, they spread antimonopoly enforcement throughout government. In addition to the Antitrust Division of the DOJ and the FTC, they established antimonopoly power within the Federal Communications Commission, the Federal Reserve, the Treasury Department, the Alcohol and Tobacco Tax and Trade Bureau, the Department of Agriculture, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, and the Surface Transportation Board, among many others.

13 Ibid, p. 23.

Through the heart of the 20th Century, leaders of both parties followed the traditions of American antimonopolism, more or less as they had been updated by Wilson and Brandeis. This was true of Coolidge and Hoover as well as FDR and Truman. It was true of Eisenhower and Nixon just as of Kennedy and Johnson.

Time and again politicians of the era clearly echoed the words of Madison, Wilson, and Brandeis.

In 1936, President Franklin Roosevelt said:

> *Today we stand committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place*.[14]

In 1942, Texas Congressman Wright Patman, who supported antimonopoly law as strongly as any American politician of the 20th Century, said:

> *The small business men and women of America are essential to our democratic way of life... They are necessary to our social order. They [are the] bulwark [of] our greatest institutions, around which all civilization is built—the home, the church and the school.*[15]

In 1952, Minnesota Congressman Hubert Humphrey, on the floor of the House, said:

> *We are not necessarily talking about whether some penny pinching person is going to be able to save half a cent on a loaf of bread. We are talking about the kind of America we want… Do we want an America where the economic marketplace is filled with a few Frankensteins and giants? Or do we want an America where there are thousands upon thousands of small entrepreneurs, independent businessmen, and landholders who can stand on their own feet and talk back to their government or to anyone else.*[16]

The ultimate goal, Humphrey made clear, was: To "produce good citizens, and good citizens are the only hope of freedom and democracy."[17]

This philosophy and practice of antimonopoly proved to be a phenomenal political and economic success. Through the heart of the 20th Century, America was at one and the same time the most free, the most prosperous, and the most powerful nation on earth. At the very height of American

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[14] Franklin D. Roosevelt: "Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pa.," June 27, 1936. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=15314.

[15] Nancy Beck Young (2000). *Wright Patman: Populism, Liberalism & The American Dream*, p. 107.

[16] Hubert H. Humphrey, Senate debate, *Congressional Record*, 82d Cong., 2d sess., 98 (July 1-2, 1952), 8741, 8823, reprinted in Kintner, *Legislative History of Federal Antitrust Laws*, Part I, vol. 1, pp. 807-808, 832.

[17] Ibid.

antitrust enforcement, American industrial know-how and military might destroyed the industrial powered dictatorships in Germany and Japan and a generation later bankrupted the Soviet Union.

BORK'S "REVOLUTION" AND THE CONCEPT OF THE CONSUMER

In the *Antitrust Paradox*, Robert Bork bases his case for radical change in antitrust on four assertions. In every instance, these stand in direct opposition to the American antimonopoly tradition of Madison, Wilson, Brandeis, Roosevelt, Eisenhower, Johnson, and Marshall. It is important to understand what exactly Bork asserted, and how he structured those assertions.

Bork's first assertion is that **the sole goal of antimonopoly law must be to promote "consumer welfare."** As he writes in the 1978 introduction to that book, "A consideration of the virtues of law *as* law demonstrates that the only legitimate goal of antitrust is the maximization of consumer welfare."[18] (Italics in the original)

Bork's second assertion is that **the one clear means to achieve this end of consumer welfare is to promote efficiency**. "Productive efficiency is one of the two opposing forces that determine the degree of consumer wellbeing (the other being resource misallocation due to monopoly power)."[19]

Bork's third assertion is that **antitrust is entirely technical in nature**. "Basic microeconomic theory is of course a science," he wrote in 1978. "Were it not a science, rational antitrust policy would be impossible." He then concludes, "We are too little accustomed … to thinking of law as a science."[20]

Bork's fourth assertion is that **the only way to understand how to enforce the law "with logical rigor" is to greatly increase the role of economics—and the economist—in enforcing the law**. In his introduction to the 1993 reissue of the *Antitrust Paradox*, Bork makes clear what he expects these economic "scientists" to do, which is to apply "economic analysis… to *test the propositions of the law*."[21] (Italics added.)

To understand how this new philosophy of antimonopoly translated into actual enforcement, consider two differences between two sets of "Merger Guidelines" published by the Department of Justice to give businesses and enforcers a sense of how government enforcers plan to interpret the law.

The 1968 guidelines, published during the last year of the Johnson Administration, focus foremost on clarifying the rules for making markets. The DOJ aims, the guidelines said, "to

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18 Robert Bork (1978). *The Antitrust Paradox*, p. xi.
19 Ibid, p. 7.
20 Ibid, p. 8.
21 Robert Bork (1993). *The Antitrust Paradox*, p. xi.

preserve and promote market structures conducive to competition."[22] The authors go on to explain the DOJ's reasoning, writing "the conduct of the individual firms in a market tends to be controlled by the structure of that market."[23]

The 1968 guidelines then provide examples of levels of concentration that the DOJ will generally oppose. For instance, in a "highly concentrated" market the DOJ will likely move to block any effort by a corporation with a 15% share of that market to buy a competitor that has 1% or more of that market.[24]

By contrast, the 1984 guidelines, published during the first term of the Reagan Administration, largely eliminate the straightforward limits on how much of a market any firm can own. Instead they aim to avoid accumulations of "market power" that might affect "price," and establish tests that economists can run to determine when there is undue "market power."[25]

One way we ourselves can measure this change between the two sets of guidelines is to count the number of times the word "price" is used in 1968 and then in 1984. Whereas the Johnson-era guidelines mention the words "price" only eight times, the Reagan-era guidelines mention the word "price" 114 times.

A second main difference between the 1968 Guidelines and the 1984 Guidelines is in how each views the value of, in Bork's words, "business efficiencies."

The 1968 guidelines are clear:

> *The Department will not accept as justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e. improvements in efficiency)."[26] Among the reasons: "there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.[27]*

The 1984 guidelines, by contrast, not only pledge to take any promise of new efficiencies into account in weighing any merger, they all but invite corporations to merge, as long as they can make a minimally reasonable case that the merger will create efficiencies that result in lower prices.

> *The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws and, thus, the standards of the Guidelines, are designed to*

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22 Department of Justice, *Merger Guidelines* (1968).
23 Ibid.
24 Ibid.
25 *Merger Guidelines* (1984).
26 *Merger Guidelines* (1968).
27 Ibid.

> *proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department.*[28]

In sum, as Bork himself put it in 1993, a true "revolution" in antitrust thinking and enforcement took place in the first Reagan Administration. And indeed, Bork's approach to antimonopoly is almost the exact opposite of the American antimonopoly tradition that we can trace to Wilson, Brandeis, and Madison.

That said, Bork's core contention was not in fact new. On the contrary, the idea that government should promote business "efficiency" for the sake of the "consumer" had been around for decades. For the purposes of this discussion, it is important to trace these twinned concepts to their first use in American politics more than a century ago.

For many Americans, consumerism dates to the 1960s and the rise of Ralph Nader. In fact, consumerism as a political concept was first shaped by a set of academics who worked closely with Teddy Roosevelt during and after the period when the former president had lost faith in open, competitive, democratic markets. This includes the economist Simon Patten and the journalist Walter Weyl. It also includes Herbert Croly, author of *The Promise of American Life*, and Walter Lippmann, who worked with Croly on *The New Republic*, and who wrote the book *Drift and Mastery*.

This group was strongly influenced by the German "progressive" movement of the late nineteenth century, which was fundamentally statist in philosophy. Members of the school held that competition was wasteful, and that corporations and the government should promote systems of command and control monopoly to boost the efficiencies of material production. The group often buttressed its political arguments with metaphysical arguments about how industrial monopoly was "natural" and "inevitable."

Members of the group held that the state should more or less directly control the giant industrial corporations, and that professional experts working for the state should direct the power of these enterprises—through systems of centralized planning—towards specific material and social outcomes.

This school centered its political economic vision around the concept of the "consumer." Members held that more efficient industrial systems would benefit the "consumer." They also promoted a political union of all "consumers," holding that this would result in a more efficient approach to politics, one that would overcome the chaotic factionalism in which various groups of workers and capitalists competed and contended with one another.

Lippmann distilled the essence of this thinking in 1914. "Collectivism or 'state socialism' is... the chief instrument of the awakened consumer," he wrote in *Drift and Mastery*. The task of the

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[28] *Merger Guidelines* (1984).

progressive elite is, therefore, "the organization and education of the consumer for control."[29]

One of the less well-studied facts about Robert Bork's antitrust "revolution" of the late 1970s and early 1980s was that it was strongly supported by many thinkers on the political "left," such as the then widely read economist Lester Thurow.

Thurow and other younger intellectuals largely followed the lead of John Kenneth Galbraith, perhaps the best known economist of the time. In his 1974 book *Economics and the Public Purpose*, Galbraith had called for a repeal of antitrust laws, and their replacement by statist systems of economic command and control.

Galbraith, in turn, traced his thinking to the generation of "progressive" and Marxian intellectuals who had advised Theodore Roosevelt.

In short, Bork's proposal to radically alter antitrust enforcement in order to promote "efficiency" in the name of the "consumer" evidently struck many left-wing statists as a pathway to the world of which they had long dreamed.

AMERICA'S MONOPOLY PROBLEM AND ITS EFFECTS

Today just about every sector of the American political economy is vastly more concentrated than a generation ago.

This is true of agricultural chemicals and seeds. Of slaughterhouses and food processors. Of grain handling and grain futures. It is true of hospitals and health insurance and medical devices and drugs. It is true of drug stores and pharmacy benefits managers and of eyeglasses and lenses.

It is true of computers and smart phones and electronics assembly and semiconductors. And it is true throughout the defense industrial base and in the manufacture of airliners and jet engines.

It is true in banking and investment funds and mortgages. And it is true of home improvement and hardware stores, of office supply stores, increasingly even of restaurants. And it is true of hotels and airlines and rental car companies, even now of taxis.

Americans get to choose from 10 major car companies. But those giants often all buy parts from the same supplier. Indeed, as my own work has demonstrated (see *End of the Line*) concentration can strip mine supply bases to a point where complex systems become subject to catastrophic failure.

A growing number of experts see the problem plainly.

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[29] Walter Lippmann (1914). *Drift and Mastery*, p. 55.

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"The fruits of economic growth are being hoarded," the *Economist* wrote recently. According to Nobel Prize winning economist Paul Krugman, "We aren't just living in a second Gilded Age we're also living in a second robber baron era." Luigi Zingales, the well-known conservative economist at the University of Chicago, has warned: "There is a direct connection between economic power, bigness, and political power."

President Trump sees America's monopoly problem. The Obama White House saw America's monopoly problem. So too candidate Hillary Clinton.

Millions of America's citizens also see the problem. But let's be clear, even though most "expert" discussion of monopolization focuses on how it cuts down supply and drives up prices, America's citizens often experience monopolization in profoundly different—and more political—ways.

For many Americans, monopolization plays out as a loss of their properties, hence their independence, even their dignity. Today, after all, it is vastly harder than a generation ago to be a farmer or to launch and grow a new independent business.

For others, monopolization means the ruin of their Heartland communities and the concentration of wealth—and opportunity—in a few mega cities along the coasts.

Other citizens perceive monopolization as a loss of control over their own lives, and of being manipulated by powerful corporations, perhaps through non-compete agreements, perhaps through non-poaching agreements, perhaps through increasingly intrusive technological control of their actions.

For other Americans what is most scary is how concentration of wealth and control appears to be disrupting American democracy.

To get some sense of how this how many citizens experience the monopolization of the last 35 yeas has affected American society and American politics, consider the story of Sam Walton.

In 1950, when Sam Walton drove into Bentonville, Arkansas he needed only $20,000 to secure a lease on one of four general stores in that town. The town itself was surrounded by hundreds of independent family farms and ranches. Across America, hundreds of thousands of families were able to live middle class lives as owners of independent stores. Millions of families lived independent lives as farmers on their own land.

The American who wanted to be his or her own boss, who wanted to create and build a family business, had ample opportunity, as long as he or she was modestly frugal and willing to work hard.

That America was no accident. The reason Sam Walton was able to secure that lease—in a nation that was already home to giant chain stores such as the A&P, Woolworths, and Sears—was because federal and state governments in the mid-20th-Century routinely used antimonopoly laws to prevent those giants from crushing small upstarts.

Today? The corporation that bears Sam Walton's name today owns more than 4,000 stores in America, which by any fair count equal more than 100,000 1950-style stores. The six main heirs of Sam Walton now control as much wealth as the bottom 41.5 percent of the population, which adds up to more than 140 million Americans.

Today's America, also, was no accident. The reason the Walton family, and the investors who back them, were able to roll up all this opportunity and all this wealth under one roof was because federal and state governments in late 20th Century America—under the sway of Consumer Welfare philosophy—largely stopped using antimonopoly law to prevent them from doing so.

Bork himself has spoken of how adoption of his Consumer Welfare philosophy resulted in a "revolution" in antitrust policy. Today it is clear that the change also resulted in truly revolutionary changes in our society, our economy, even our politics.

Before you dismiss this story of 1950 America as naïve nostalgia, we should keep in mind that the era of Walmart also now appears to be falling away, at least as fast as it came.

In America today we are witnessing a whole new level of concentration—of wealth, power, and control—in the hands of the people who control Amazon, Google, and Facebook and a few other giants that grew to power on the Internet.

These corporations have captured a level of control over our commerce, and over the flow of information and news, that is unprecedented in our history. In the vein of the British East India Company, they stand in between the citizen as producer of goods, and ideas and work, and the citizen as buyer of goods, ideas, and work, and they exploit that position to regulate us.

Further, these corporations are armed with powers that no Soviet central planner could ever have dreamed of having. They are the central governors, the master manipulators, of our time. And even the greatest powers of a decade ago, such as Walmart, cower before them.

CONSUMER WELFARE OR DEMOCRACY

A fast growing number of antitrust professionals do recognize that America has some sort of monopoly problem. John Kwoka, with his excellent recent book, *Mergers, Merger Controls, and Remedies*, stands out.

The question before us is what to do about the problem? And more specifically, do we need to alter or entirely abandon Robert Bork's Consumer Welfare philosophy of antitrust enforcement, if we are to deal effectively with the problem.

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Some leaders within the antitrust academy appear open to a major change in thinking. Renata Hesse, when she was Acting Assistant Attorney General for Antitrust, in a September 2016 speech said, "the legislative history of the Sherman Act makes it clear that the antitrust laws were intended to benefit participants in the American economy broadly—not just in their capacity as consumers of goods and services."[30]

But other members of the academy contend the "Consumer Welfare" philosophy is sufficient to the task at hand. They may recognize that concentration has gone too far. But they believe that a more vigorous enforcement of the laws will solve the problems.

I agree that America's antimonopoly laws are largely up to the task, as they were originally framed by Congress. I also agree that antitrust enforcers should not have to make political decisions, or judge between different political outcomes. That's because Congress already made those political decisions when it originally framed and enacted those statutes.

The job of antitrust enforcers is to determine systems by which to achieve the stated will of Congress, and of the American people. A good example of how to achieve this is the 1968 merger guidelines.

I believe we must formally abandon the "Consumer Welfare" philosophy, for three reasons.

First, the Consumer Welfare philosophy warps how we apply the law. Some defenders of the Consumer Welfare philosophy have warned against aiming antitrust enforcement at specific policy outcomes—such as reducing inequality or raising the earnings of workers or fighting concentrated political power. As Carl Shapiro put it in a recent paper: "While stronger antitrust enforcement will modestly help address income inequality, explicitly bringing income distribution into antitrust analysis would be unwise."[31]

But is not the exact same thing true of the "Consumer Welfare" philosophy itself? The decision a generation ago to focus enforcement of the law only on "efficiency" and the reduction of prices also marked the elevation of one specific policy outcome over a great many other potential outcomes from the same policy.

The previous approach to antitrust enforcement, by focusing foremost on the making and maintenance of "market structures" designed to prevent the concentration of power and to keep markets open and competitive, avoided such warping of the law. Make competitive markets and those markets will take care of pricing, wages, innovation, and of the fair distribution of opportunity and voice.

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[30] Acting Assistant Attorney General Renata Hesse of the Antitrust Division Delivers Opening Remarks at 2016 Global Antitrust Enforcement Symposium, Washington, DC. Tuesday, September 20, 2016.

[31] Carl Shapiro (2017). *Antitrust in a Time of Populism.* Retrieved from http://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf

Second is that the "Consumer Welfare" philosophy was deeply political in its conception, and aimed to promote particular political outcomes over other political outcomes.

We see this at the specific level, in Bork's admonitions against taking any factor other than theoretical efficiencies into account. For instance, in 1978 he wrote, "The judge must not weigh against consumer welfare any other goal, such as the supposed social benefits of preserving small businesses."[32]

More disturbingly we see it in Bork's attitudes towards the sovereignty of Congress and the American people. For 200 years, the American people had worked through Congress to achieve a particular vision of how to organize competition within our society, to ensure the preservation and promotion of specific liberties, balances, and values.

But in *The Antitrust Paradox*, Bork reveals a great disdain for both Congress and the American people. "There is more to fear than that," he writes. "For the Courts are of course not the sole generators of antitrust policy. A new era of antitrust expansion is likely to begin in Congress, which is influenced by popular moods."[33]

In 1993, looking back on what he was now willing to describe as a "revolution in a major American policy," Bork himself detailed exactly how this grand change had been effected, and it was not by Congress but by a very small group of scholars and judges.

> *The decisive cause [of the revolution in antitrust], of course, was a change in the composition of the Supreme Court. The justices who replaced much of the Warren Court's majority were not liberal ideologues and they had a better and more sympathetic understanding of the business world than did their predecessors. They also had available to them a new, if still a minority, body of antitrust scholarship that* ***made it easier to change the course of the law****.*[34]

In other words, what we are dealing with here is a conscious and ultimately highly successful effort to subvert the expressed will of Congress and the American people.

The third reason we should formally abandon the Consumer Welfare philosophy is because this way of seeing the world continues to blind antitrust professionals both to the magnitude and nature of America's antimonopoly problem and to many of the tools we can use to fight the problem.

The promotion of "efficiency" in the name of the "consumer" has resulted in power in the U.S. economy being concentrated pretty much exactly as the command and control left of 1975, or 1912, would have predicted. Yet good Americans, patriotic Americans, who have devoted much

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[32] Bork, 1978, p. xi.
[33] Bork, 1978. p. 5.
[34] Bork, 1978. p. xi.

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of their lives to public service, are prevented by their adherence to the Consumer Welfare philosophy from even seeing the problem.

As the *Economist* put it recently, and politely, "With their heads deep in data and court rulings that set fine precedents, the scientists of antitrust are able to sidestep some troubling questions. If markets are truly competitive, why do so many companies now claim they can retain the cost synergies that big deals create, not pass them on to consumers? Why do investors believe them? Why have returns on capital risen almost everywhere."[35]

There is one thing Robert Bork got right. "Antitrust is a subcategory of ideology," he wrote in 1978.[36]

More than a century ago, Louis Brandeis warned Americans of the dangers of exactly such an ideology as the one that Bork succeeded in foisting onto our nation, in language as clear and cold as a Maine stream.

> *Americans should be under no illusions as to the value or effect of price-cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the co-operation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.*[37]

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35 The Economist. *Too much of a good thing*, (2016). https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing

36 Bork, 1978. p. 3

37 https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-15