UNIVERSIDAD ADOLFO IBÁÑEZ

I SEEK TO SPEAK THE LANGUAGE OF COMPETITION: THE CONSUMER WELFARE STANDARD, THE ELABORATION PRINCIPLE, AND THE LEXICON OF SHERMAN ACT COMPETITION

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I Seek to Speak the Language of Competition: the Consumer Welfare Standard, the Elaboration Principle, and the Lexicon of Sherman Act Competition

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Abstract: *Antitrust's consumer welfare standard is in a period of sustained criticism yet also continued relevance. The newly-installed Neo-Brandeisian enforcers, no fans of the consumer welfare standard if one believes their rhetoric, have not been shy about pursuing consumer-oriented theories of antitrust harm when bringing cases, as they did recently in blocking the proposed merger between Spirit Airlines and JetBlue Airways. Indeed, the Department of Justice has peddled its more innovative labor-side antitrust cases as mere inversions of classic consumer-side per se offenses. They have also argued that even these labor-side antitrust cases help consumers. Their continued use of consumer-focused language despite the Neo-Brandeisians' anti-consumer welfare standard rhetoric suggests that, while the consumer welfare standard is widely influential, its ubiquity has created a mistaken impression of its actual utility to lawyers and judges in antitrust cases. Portraying the various suggested standards in contrast to each other diminishes their function in meeting the antitrust laws' evidentiary requirements. Even the terms "consumer welfare standard" and "citizen welfare standard" suggest a doctrinal feature of the antitrust statutes rather than an elaboration of their text.*

Both the consumer welfare standard and its oppositional progeny are best understood as elaborations on the palpable yet broad goal discernable from the text of the Sherman Antitrust Act: competition itself. Though there is obvious acrimony between those who favor the consumer welfare standard and those who urge adoption of an alternative, they agree about the indisputable objectives of the statute: facilitation of competition and prevention of monopoly. The Sherman Act's text makes these goals perfectly clear. While these broad goals are easy to describe in the abstract, application in individual cases requires explanation and elaboration to describe and charge actions that harm competition and encourage monopoly. The purpose of the consumer welfare standard and any of its supposed alternatives is to elaborate on these goals effectively, and to give judges and lawyers the proper language to discuss competition and potential harms.

This paper argues that the debate over the appropriate welfare standard for antitrust has obscured this purpose, and that antitrust law has either not articulated or not emphasized this doctrinal feature of antitrust law with sufficient clarity. The consumer welfare standard's explanation of competition is how judges understand the term in Sherman Act cases, and how practitioners explain the concept. Given this entrenched incumbency, any proposed alternative must supplement the consumer welfare standard rather than replace it.

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INTRODUCTION

Dominant American antitrust discourse suggests that it is time for a change in the standard by which enforcers measure competition and the goals the law should implement. Even if the consensus that antitrust law should concern itself exclusively with consumer welfare has never been as strong as it appeared,[1] the rise of the Neo-Brandeisian school of antitrust analysis has placed a renewed emphasis on economic structuralism and non-economic goals as the bases of effective antitrust enforcement.[2] This past year's theme for the University of Chicago's George Stigler Center Antitrust and Competition Conference was entitled appropriately "Beyond the Consumer Welfare Standard."[3] The mood of the conference was decisively against the consumer welfare standard, and it had very few defenders in an unmodified form.[4] A purely economic view of antitrust seemed a relic of the past, and new political goals such as equality, preventing consolidation of wealth in the hands of few persons, and preserving democratic freedom were the new orthodoxy.[5]

The calls for a new standard became increasingly important when Joe Biden won the 2020 presidential election. He elevated the Neo-Brandeisians to leadership positions within his administration, placing Lina Khan as Chair of the Federal Trade Commission (FTC), installing Tim Wu as Special Assistant to the President for Technology and Competition Policy, and appointing Jonathan Kanter as Assistant Attorney General for the Antitrust Division of the Department of Justice (DOJ).[6] President Biden put considerable rhetorical weight behind a revivified focus on competition in the marketplace and the rejection of a perceived-lax antitrust policy when he gave his "Forty Years of Failure" speech criticizing proponents of the consumer welfare standard and its great champion Robert Bork specifically.[7] His Executive Order on Promoting Competition in the American Economy[8] and the FTC and DOJ's more aggressive and innovative enforcement of the antitrust laws[9] are the policy iterations of the rhetoric.

Despite the shift, competition remains the policy of the Sherman Act and the consumer welfare standard its primary explanatory device for judges and lawyers. The new rhetoric on the need to incorporate more goals into antitrust and develop a standard distinct from the consumer welfare model belies how comparatively little of a practical effect the debate has for lawyers in everyday practice, even for enforcers. Despite the rhetoric, the Supreme Court has never explicitly adopted the consumer welfare

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1 *See* Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 Antitrust L.J. 601, 605 (2014) (describing the "ongoing controversy over the whether the goal of an economics-based antitrust is or should be total welfare (i.e., efficiency) versus consumer welfare," and that "[w]hile it is an oversimplification . . . more conservatives favor the total welfare standard while more liberals favor the consumer welfare standard.").

2 *See* Lina M. Khan, Amazon's *Antitrust Paradox*, 126 Yale L.J. 710, 737-39 (2017) (articulating the flaws of the consumer welfare standard and iterating the Neo-Brandeisian alternative); Carl T. Bogus, The New Road to Serfdom: *The Curse of Bigness and the Failure of Antitrust*, 49 U. Mich. J.L. Reform 1, 73 (2015) (describing a debate between "the consumer welfare model and what may be called the citizen welfare model--one that insisted upon taking account not only people's roles as consumers, but also their roles as workers and members of communities").

3 *See* 2023 Antitrust and Competition Conference - Beyond the Consumer Welfare Standard?, The University of Chicago Booth School of Business, available at https://www.chicagobooth.edu/research/stigler/events/2023-antitrust.

4 The author attended this conference, and observed this trend first-hand.

5 Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551, 559-60 (2012) (stating that antitrust had many goals historically, including "(1) economic (competition maximizes 'economic efficiency'), (2) political (antitrust principles 'intended to block private accumulations of power and protect democratic government'), and (3) social and moral (competitive process was 'disciplinary machinery' for character development") (quoting Richard Hofstadter, What Happened to the Antitrust Movement?, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 199-200).

6 *See* Katherine Rich, *United States leads the way on competition law reform, we need to follow*, The Post (Apr. 30, 2023), available at https://www.thepost.co.nz/business/350005339/united-states-leads-way-competition-law-reform-we-need-follow; Marina Lao, Reimagining Merger Analysis to Include Intent, 71 Emory L.J. 1035, 1037 n. 7 (2022) (stating that "[w]ith Lina Khan appointed as the new Chair of the Federal Trade Commission (FTC) and Jonathan Kanter as the head of the Antitrust Division of the Department of Justice (DOJ), the two federal antitrust agencies are clearly changing course.").

7 Joe Biden, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy, WhiteHouse.gov (July 9, 2021 at 1:48 PM), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

8 Executive Order on Promoting Competition in the American Economy, WhiteHouse.gov (July 9, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

9 Amanda Wait, Brian Boyle, Paolo Morante, Amadeu Ribeiro, David Hamilton, Brett Feldman, *FTC and DOJ's new Merger Guidelines formalize aggressive approach to antitrust enforcement*, DLA Piper (Jan. 10, 2024), available at https://www.dlapiper.com/en/insights/publications/2024/01/ftc-and-dojs-new-merger-guidelines-formalize-aggressive-approach-to-antitrust-enforcement.

standard as doctrine.[10] Though it has stated that Congress designed the antitrust laws as a "consumer welfare prescription" and cited Robert Bork's work liberally,[11] it has also recently blessed a labor-side antitrust case largely divorced from consumer interests.[12] Even in this case, however, the Court's opinion was replete with language influenced by the consumer welfare standard.[13]

The newly-installed Neo-Brandeisian enforcers have also not been shy about pursuing consumer-oriented theories of antitrust harm when bringing cases, as they did recently in blocking the proposed merger between Spirit Airlines and JetBlue Airways.[14] Indeed, the Department of Justice has peddled its more innovative labor-side antitrust cases as mere inversions of classic consumer-side per se offenses.[15] They have also argued that even these labor-side antitrust cases help consumers.[16] Their continued use of consumer-focused language despite the Neo-Brandeisians' anti-consumer welfare standard rhetoric may suggest that, while the consumer welfare standard is widely influential, its ubiquity has created a mistaken impression of its actual utility to lawyers and judges in antitrust cases. Portraying the various suggested standards in contrast to each other diminishes their function in meeting the antitrust laws' evidentiary requirements. Even the terms "consumer welfare standard" and "citizen welfare standard" suggest a doctrinal feature of the antitrust statutes rather than an elaboration of their text.

Both the consumer welfare standard and its oppositional progeny are best understood as elaborations on the palpable yet broad goal discernable from the text of the Sherman Antitrust Act: competition itself. Though there is obvious acrimony between those who favor the consumer welfare standard and those who urge adoption of an alternative, they agree about the indisputable objectives of the statute: facilitation of competition and prevention of monopoly.[17] The Sherman Act's text makes these goals perfectly clear.[18] While these broad goals are easy to describe in the abstract, application in individual cases requires explanation and elaboration to describe and charge actions that harm competition and encourage monopoly. The purpose of the consumer welfare standard and any of its supposed alternatives is to elaborate on these goals effectively, and to give judges and lawyers the proper language to discuss competition and potential harms.

This paper argues that the debate over the appropriate welfare standard for antitrust has obscured this purpose, and that antitrust law has either not articulated or not emphasized this doctrinal feature of antitrust law with sufficient clarity. Part I gives background on an apparently fundamental disagreement between

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10 Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, 14 Antitrust Source 1 (2015).

11 Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 347 (2010) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

12 Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021). Admittedly, however, that case also stated that "[j]udges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare." *Id.* at 2166. Justice Kavanaugh's concurrence expressed concern, however, with the challenged restraint's capacity to help the NCAA "build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated." *Id.* at 2169 (Kavanaugh, J., concurring). He also emphasized that labor-side antitrust violations were no different than regular antitrust violations. *Id.* at 2167-68 (Kavanaugh, J., concurring).

13 *Id.* at 2166 (stating that "[w]hen it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare.").

14 United States v. JetBlue Airways Corp., No. CV 23-10511-WGY, 2024 WL 162876 (D. Mass. Jan. 16, 2024).

15 Antitrust Guidance for Human Resource Professionals, Department of Justice (Oct. 2016) at 4, available at https://www.justice.gov/atr/file/903511/download (stating that "naked wage-fixing or no-poaching agreements. . . . eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.").

16 *Id.* at 2 (contending that "[c]onsumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services.").

17 *Compare, e.g.,* Robert Bork, The Antitrust Paradox (1978) 84 (noting the Sherman Act's "textual demand for competition") *with* Khan, *Amazon's Antitrust Paradox*, 126 Y.L.J. at 717 (arguing for a different method of "gauging real competition in the twenty-first century marketplace," but nevertheless operating under the presumption that competition is the goal of antitrust law).

18 15 U.S.C. § 1 (declaring that "[e]very 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 . . . illegal"); 15 U.S.C. § 2 (stating that "[e]very 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"). The term "restraint of trade" would be interpreted today as "harm to competition."

Justice John Marshall Harlan and Chief Justice Edward White that defined how judges should interpret the Sherman Act, and how current case law often obscures the principle they determined. Part II describes the consumer welfare standard, including its two primary features: the explanatory language it uses to define anticompetitive harm and its statement of appropriate antitrust goals. It also discusses the proposed alternatives to the consumer welfare standard.

Part III demonstrates that the antitrust laws have an Elaboration Principle which requires enforcers and plaintiffs to articulate features of competition as a broad concept while elaborating on its relevant actors and benefits. The way that the enforcer and the defendant elaborate on competition defines the language the judge and others use to understand competition, and in turn defines how to discern harm. A judge reviewing a plaintiff or enforcer's challenge must evaluate how well the plaintiff or enforcer has elaborated on the harms the challenged restraint has on the broadly stated goals of the antitrust laws, which are understood easily in broad strokes but require greater explanation in their application to individual cases. Part IV explains how the consumer welfare standard and any possible alternatives allow enforcers to elaborate on the antitrust laws' broad goals by giving them the evidentiary and descriptive tools needed to prove a harm to competition. This section illustrates that, despite claims of incompatibility, the consumer welfare standard and any alternative standards are simply different tools in antitrust plaintiffs' arsenal which can be deployed at plaintiffs' discretion to better explain the injury to competition.

I. AN APPARENT FOUNDING DISAGREEMENT: JUSTICE JOHN MARSHALL HARLAN, CHIEF JUSTICE EDWARD DOUGLASS WHITE, AND THE ANTI-TRUST TEXT

The Sherman Antitrust Act could not announce its goals and prohibitions any more plainly. Its two substantive sections state succinctly that "[e]very 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 . . . illegal,"[19] and that "[e]very 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."[20] In modern language, the statute bans both attempted and consummated business agreements and actions which harm competition or tend to create a monopoly. While being a monopoly itself is not illegal,[21] the statute creates a policy in favor of competition and against monopoly which sweeps widely to include every business arrangement which could conceivably hinder these goals.[22] Indeed, the Supreme Court has rejected definitively the notion that one might argue that competition itself is inappropriate in challenged circumstances.[23]

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19 15 U.S.C. § 1.

20 15 U.S.C. § 2.

21 *See* United States v. U.S. Steel Corp., 251 U.S. 417, 451, 40 S. Ct. 293, 299, 64 L. Ed. 343 (1920) (stating that "the law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible.").

22 William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law' Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 666 (1982) (commenting on the broad nature of the Sherman Act, and stating that "[w]hile the common-law approach lacks the certainty of the statutory approach, it permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law."); Nat'l Soc. of Pro. Engineers v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978) ("Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its applications in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.")

23 *See Nat'l Soc. of Pro. Engineers*, 435 U.S. at 695 ("Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," namely an injury related to diminution of competition).

While the Sherman Antitrust Act's language is plain, there has been a recurrent want of clarity as to what it bans precisely. Even the Supreme Court has written that the Sherman Act "cannot mean what it says" because it seems to sweep so broadly.[24] Initial Supreme Court decisions interpreting the statute illustrate the discrepancy in clarity which has plagued the statute from its earliest days. In the landmark decision *Standard Oil Co*. of New Jersey v. United States, Chief Justice Edward Douglass White declared that "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve."[25] Though this description of how to use the statute is itself indeterminate, future Chief Justice of the United States William Howard Taft used a similar interpretation of the statute when he recognized that a restraint which may harm competition in some indirect manner is nevertheless legal if it "it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract."[26] If the true purpose or manifest effect of the contract was to reduce competition, the Sherman Act prohibited it under the doctrine of the rule of reason.

Justice John Marshall Harlan bristled at this interpretation of the statute. Citing the text of the statute while dissenting in *Standard Oil*, he emphasized that "[t]he language of the act includes *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. So far as the very terms of the statute go, they apply to *any* contract of the nature described."[27] Justice Harlan's interpretation of the statute was consistent with his opinion in *Northern Securities Co. v. United States*,[28] and more compatible with Supreme Court decisions interpreting the statute prior to *Standard Oil*.[29] He maintained that the Chief Justice White's interpretation of the Sherman Antitrust Act "read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution; namely, by interpretation of a statute changed a public policy declared by the legislative department."[30] Correctly or incorrectly, subsequent Court decisions have adopted Chief Justice White's interpretation.[31]

Antitrust textualism has enjoyed a surge in popularity recently.[32] Ironically, most of the calls for textualist antitrust analysis have come from the Neo-Brandeisian liberals seeking to reform antitrust.[33] With the

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24 *Nat'l Soc. of Pro. Engineers*, 435 U.S. at 687; *see also* Daniel A. Farber & Brett H. McDonnell, *"Is There A Text in This Class?" the Conflict Between Textualism and Antitrust*, 14 J. Contemp. Legal Issues 619, 621 (2005) (reporting that "[i]n antitrust . . . it seems that there are no statutory texts, just 'us'--more specifically, contemporary judges and economists," and that "[t]he reason, it would appear from the writings of scholars and judges, is that the statutory texts are essentially devoid of content. Or rather, they are merely an instruction to judges to use their best economic judgment."); Daniel A. Crane, *Antitrust Antitextualism*, 96 Notre Dame L. Rev. 1205 (2021) (observing that "[s]cholars and judges widely agree that the U.S. antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating.").

25 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911).

26 United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

27 *Standard Oil Co.*, 221 U.S. at 86 (Harlan, J., concurring in part and dissenting in part) (quoting United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312, 17 S. Ct. 540, 547-48, 41 L. Ed. 1007 (1897)) (emphasis in original).

28 N. Sec. Co. v. United States, 193 U.S. 197, 331, 24 S. Ct. 436, 454, 48 L. Ed. 679 (1904) (holding that "although the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature").

29 *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 326, 17 S. Ct. 540, 553, 41 L. Ed. 1007 (1897) (holding that "[w]hile the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.").

30 *Standard Oil Co.*, 221 U.S. at 104-05 (Harlan, J., concurring in part and dissenting in part).

31 Alston, 141 S. Ct. at 2151 (stating that "[d]etermining whether a restraint is undue for purposes of the Sherman Act 'presumptively' calls for what we have described as a 'rule of reason analysis.'") (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006); *Standard Oil Co.*, 221 U.S. at 60–62)).

32 *See generally* Robert H. Lande & Richard O. Zerbe, *The Sherman Act Is A No-Fault Monopolization Statute: A Textualist Demonstration*, 70 Am. U. L. Rev. 497, 500–01 (2020) (purporting to "the first ever textualist analysis of the language in the statute" to show that the Sherman Act bans monopolies whether or not they abuse their monopoly power); Daniel A. Crane, *Antitrust Antitextualism*, 96 Notre Dame L. Rev. 1205 (2021) (analyzing the odd fact that antitrust laws seem to be read atextually despite modern jurisprudential trends); Daniel A. Farber & Brett H. McDonnell, *"Is There A Text in This Class?" the Conflict Between Textualism and Antitrust*, 14 J. Contemp. Legal Issues 619 (2005) (evaluating the conventional claims of atextualism in antitrust).

33 *See, e.g.*, Lina M. Khan, The End of Antitrust History Revisited: The Curse of Bigness: Antitrust in the New Gilded Age. by Tim Wu. New York, N.Y.: Columbia Global Reports. 2018. Pp. 154. $14.99, 133 Harv. L. Rev. 1655, 1679 (2020) (stating that "[n]ot only have judges supplanted their traditional interpretive task of statutory gap-filling with judicial lawmaking, but they have violat[ed] every conceivable canon of statutory interpretation along the way. Even the most ardent textualists show casual disregard for the text of the antitrust laws, and statutory

Supreme Court's supermajority of textualists and originalists now in control and Justice Elena Kagan's well-known dictum that "we are all textualists now,"[34] Chief Justice White and Justice Harlan's apparent early disagreement in interpretation of the Sherman Act's text is more important than ever. The dispute between them is the best lens through which to understand the statute's proper textual interpretation, though the consumer welfare standard is the most common way in which judges and practitioners do so.

II. THE CONSUMER WELFARE STANDARD AND ITS ALTERNATIVES: MANY ROUTES TO THE SAME QUESTION

The consumer welfare standard, though integrated into antitrust jurisprudence several decades after the rule of reason, has become almost as ubiquitous a feature as it. Robert Bork, a professor of law at Yale, developed this standard in his influential book *The Antitrust Paradox*.[35] Bork proposed that the singular goal of antitrust policy should be to enhance the welfare of consumers, and that the best way to do so was to analyze any antitrust case economically to derive its effect on basic data relevant to consumers like price.[36] Though there seems to be some controversy from the commentators as to whether the consumer welfare standard considers anything but price,[37] it would be difficult to deny that a harm to the prices consumers pay is the typical method of showing anti-competitive injury under this regime.[38]

The consumer welfare standard makes two claims, one as a statement of goals applicable to enforcers and the other as an articulation of the anticompetitive harms the Sherman Act seeks to remedy. The consumer welfare standard claims first, and unremarkably, that competition should benefit consumers through lower prices obtained by competitors made economically efficient, and that a purpose of promoting competition through the Sherman Act is to obtain this benefit.[39] Robert Bork, however, went one step further: that consumer welfare measured in economic terms should be the sole goal of antitrust. He contended with

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text generally receives only passing mention in antitrust cases. [C]ontrol over the meaning of the antitrust laws now rests firmly in the grip of this unelected judiciary.") (internal citations omitted).

34 Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube at 08:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

35 Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336 n.2 (2010).

36 Elyse Dorsey et. al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 Pepp. L. Rev. 861, 875-76 (2020) recounting that "[t]he debates that started with . . . Bork forced legal scholars to consider the first principles that guided antitrust and to answer why competition is valuable. In other words, scholars, judges, and lawyers were forced to evaluate whether competition was a valuable good in itself or was instrumentally good because it could produce a better result. The answer that emerged was that competition leads to lower prices, expanded output, better quality, and more innovation--that is to say, it produces outcomes that benefit consumers."); Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. Chi. L. Rev. 595, 597–98 (2020) (chronicling that "[b]efore 1975, the Supreme Court never mentioned the term 'consumer welfare' in an antitrust case. That changed with the rise of the Chicago School of Economics in the late 1970s, symbolized by the publication of then-Professor Robert Bork's book The Antitrust Paradox in 1978.").

37 *Compare* Beatriz Del Chiaro da Rosa*, FTC v. Qualcomm and the Need to Reboot Antitrust Goals*, 30 U. Miami Bus. L. Rev. 267 (2022) (stating that "most people today view the consumer welfare principle as encouraging 'markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low.'") (quoting Herbert Hovenkamp, On the Meaning of Antitrust's Consumer Welfare Principle, REVUE CONCURRENTIALISTE, Jan. 17, 2020, at 66) *and* Steinbaum & Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. Chi. L. Rev. at 606 (criticizing the consumer welfare standard because "[a]s a result of the Court's latest perplexing requirement in cases involving vertical restraints, plaintiffs will have to define a relevant market (often a costly, time-consuming endeavor, using antitrust's price-centric tools), calculate the defendant's market share in that market, and then show that the market share is high enough to infer the defendant's market power, even when plaintiffs have strong evidence of the restraint's anticompetitive effects.") *with* Douglas H. Ginsburg, *Balancing Unquantified Harms and Benefits in Antitrust Cases Under the Consumer Welfare Standard*, 2019 Colum. Bus. L. Rev. 824, 827 (2019) (responding that "[a]lthough some critics charge that antitrust under the consumer welfare standard revolves solely around price effects, this is simply not the case. Other dimensions of competition also affect consumer welfare, including product quality, service, and innovation. Antitrust enforcement under the consumer welfare standard routinely takes these factors into account whenever they are likely to be significant.").

38 Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551, 575 (2012) (stating that a "'prototypical example of antitrust injury' is that consumers 'had to pay higher prices (or experienced a reduction in the quality of service) as a result of a defendant's anticompetitive conduct.'") (quoting Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 478 (S.D.N.Y. 2001)).

39 Herbert Hovenkamp*, Implementing Antitrust's Welfare Goals*, 81 Fordham L. Rev. 2471, 2473 (2013) (noting that "[t]he simple version of the consumer welfare test is not a balancing test in the sense that one must attempt to measure and net out productive efficiency gains and allocative efficiency losses. If consumers are harmed (either by reduced output or product quality or by higher prices resulting from the exercise of market power), then this fact trumps any amount of offsetting gains to producers and presumably to others. Theoretically, even a minor injury to consumers outweighs significant efficiency gains. In this sense, the consumer welfare test is easier to administer on a case-by-case basis than general welfare tests.").

a very tendentious review of the Sherman Act's legislative history that Congress had only these interests of consumers in mind when it passed the law.[40] The Supreme Court has never completely embraced this aspect of Bork's argument, though it has used increasingly consumer-focused language in its opinions since the publication of Bork's book.[41] Consistent with this trend, even the opponents of the consumer welfare standard accept that consumers should be a beneficiary of antitrust enforcement.[42]

Practically, however, the far more important feature of the consumer welfare standard is its method of proving anti-competitive injury. Chief Justice White's reading of the Sherman Act under the Rule of Reason requires a burden shifting approach: the government proves that a restraint, merger, or type of conduct has anti-competitive effects and then the burden shifts to the defendant to argue for its pro-competitive merits.[43] Both burdens of proof ultimately reach the same question of whether the challenge to the restraint, business practice, or merger is correct that the challenged conduct will harm competition. Stating the question either way sidesteps two more fundamental steps in the analysis: how does an enforcer show that the restraint harms competition and how will the defendant show that it does not? The consumer welfare standard provides an answer to both. Though debate about goals and the relevant welfare standard rarely makes a difference in individual antitrust cases,[44] lawyers litigating antitrust cases and advising clients must frequently articulate how a restraint, business practice, or merger may or may not harm competition. The consumer welfare standard gave them the linguistic and evidentiary tools to do so by focusing, if perhaps myopically, on how much consumers who purchase the company's goods will pay for them.[45]

The consumer welfare standard has come under strident criticism since the early 2000s, but there is a meaningful distinction between those who merely criticize the consumer welfare standard and those who propose alternative standards. The critics of the consumer welfare standard are called Neo-Brandeisians, and they are easy to identify. Neo-Brandeisians argue broadly that the consumer welfare standard undervalues market concentration and the role of market structures, and that its primary focus on price and consumers prevents scrutiny of other legitimate harms to competition.[46] Though they portray themselves in opposition to the consumer welfare standard

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40 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 193 (2008) (recognizing that because "the antitrust laws cannot be properly interpreted until their goals are determined, [Bork] argued that the only permissible objective of these laws is to enhance economic efficiency. In his famous article, Legislative Intent and the Policy of the Sherman Act, Bork appeared to demonstrate how the legislative history of the Sherman Act established that when Congress debated and passed the Sherman Act it had only one concern: increased economic efficiency.").

41 Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 107, 104 S. Ct. 2948, 2963, 82 L. Ed. 2d 70 (1984) (noting that "Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting *Reiter*, 442 U.S. at 343); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221, 113 S. Ct. 2578, 2587, 125 L. Ed. 2d 168 (1993) (emphasizing "the antitrust laws' traditional concern for consumer welfare and price competition."); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290, 201 L. Ed. 2d 678 (2018) (reciting old case law which recognized that "vertical restraints can prevent retailers from free riding and thus increase the availability of tangible or intangible services or promotional efforts that enhance competition and consumer welfare.") (Internal citations omitted).

42 United States v. JetBlue Airways Corp., No. CV 23-10511-WGY, 2024 WL 162876 (D. Mass. Jan. 16, 2024) (challenging a merger based on its effect on prices for consumers in the airline industry); Connor Leydecker, *A Different Curse: Improving the Antitrust Debate About "Bigness"*, 18 N.Y.U. J.L. & Bus. 845, 850 (2022) (arguing that "critics have often mischaracterized Neo-Brandeisian thinking as being antithetical to certain values imbued in current antitrust standards," namely lower prices for consumers); Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. 65, 67, 94 (2019) (worrying that "[t]he neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers," but also admitting that Neo-Brandeisians often only believe that low prices are a bad thing when "when they come from large firms at the expense of higher cost rivals" in such a way that the lower prices harm market structure).

43 *Alston*, 141 S. Ct. at 2160 (stating that "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anti-competitive effect. Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.") (Internal citations omitted).

44 Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. at 67 (declaring that "few antitrust outcomes have depended on the choice of a welfare test.").

45 This is a slightly simplified view of the consumer welfare standard for the purposes of this paper, for, as Judge Douglas Ginsburg notes, the consumer welfare standard accounts or could account for other elements. Ginsburg, *Balancing Unquantified Harms and Benefits in Antitrust Cases Under the Consumer Welfare Standard*, 2019 Colum. Bus. L. Rev. at 827. The purpose of using this characterization of the consumer welfare standard, however, is to illustrate its obvious ability to explain the broad notion of a harm to competition by focusing on price, not its exact doctrinal contours.

46 *See* Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. at 67 (noting that "a central claim of the neo-Brandeis approach is that markets are fragile, presenting numerous threats of collusion or monopoly. Further, antitrust policy should be driven more by political theory rather than economics. While political voices are diverse, making it difficult to identify a single theme, one clear consequence is greater protection for small business, nearly always at consumers' expense"); Christopher Jon Sprigman, What Does Antitrust's Revival Mean for Copyright?, 68 J. Copyright Soc'y U.S.A. 1, 12 (2021) (describing that "in [the Neo-Brandeisians'] view, by the time

rhetorically, their more direct appeals for reform often focus on the harm the consumer welfare standard has allegedly done to consumers, likely for political and rhetorical reasons.[47] As for antitrust's goals, the Neo-Brandeisians reject Bork's claim that consumer welfare is the only concern of antitrust law.[48] They suggest that antitrust law should account for other interests besides consumer's, such as the reductive effect concentration in the marketplace has on workers' wages.[49] Neo-Brandeisians define themselves as a reaction against and refutation of Robert Bork and the influence of his compatriots in the Chicago School of Antitrust, but as few today identify with this precise school of thought they have used the consumer welfare standard, to which many still ascribe, as an analogue for the policies a Chicago School advocate might support.

While opponents of the consumer welfare standard's goal priorities are identifiable with reasonable clarity, there is no single clearly articulated alternative to the consumer welfare standard's descriptive function. Neo-Brandeisians were once criticized for ambiguity in their individual policy proposals; this is no longer the case.[50] Neo-Brandeisians and their supporters have described several similarly-named standards which purport to supplant or oppose the consumer welfare standard. Maurice Stucke and Marshall Steinbaum, for example, argue for an "effective competition standard" to "replace the prevailing consumer welfare standard."[51] The effective competition standard purports to "restore [...] 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, including throughout supply chains and in the labor market"[52] by "us[ing] the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserv[ing] opportunities for competitors; promot[ing] individual autonomy and well-being; and dispers[ing] private power."[53] Presumably this means describing the harm to competition in terms of an revivified structural presumption for a market and accompanying dynamics desirable in a market with many competitors. Similarly, the citizen welfare standard describes a commitment to a more "egalitarian vision of . . . welfare [that] strives to dissolve monopoly power."[54] While not as specific as the consumer welfare standard's explanation of price increases as the evidence that a challenged restraint, merger, or course of business conduct, they offer a reasonable articulation of the harms to competition that the Neo-Brandeisians hope to prevent, if one that is not as readily identifiable as the consumer welfare standard.

The foregoing synopsis of the antitrust laws and the standards used to apply them suggests division, opposition, and contrast: Chief Justice White's Rule of Reason interpretation of the Sherman Act against Justice Harlan's literal one, and the consumer welfare standard's elaboration of harms to competition against the Neo-Brandeisians'. Both of these dichotomies are false.

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that harms to competition manifest in the form of higher consumer prices--if they ever do--most of the damage to markets is done and will be difficult to reverse.").

47 *See, e.g.*, Jonathan Tepper and Denise Hearn, The Myth of Capitalism 40–45 (2023) (describing the danger of monopolization through the ability to raise prices for consumers in sectors such as healthcare, air travel, and beverages).

48 *See, e.g.,* Khan, *supra* n. 2 at 737 (arguing that "the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends--including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e., whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e., whether consumers are materially better off).").

49 *Id.* at 718 (arguing that antitrust law should be concerned with labor issues because "monopolistic and oligopolistic firms have greater bargaining power against consumers, suppliers, and workers, which enables them to hike prices and degrade service and quality while maintaining profits."); Hiba Hafiz*, Labor Antitrust's Paradox*, 87 U. Chi. L. Rev. 381, 382 (2020) (describing "recent surge of interest focuses on applying antitrust law in labor markets, or 'labor antitrust.' . . . [which] call for more aggressive enforcement by the Department of Justice (DOJ) and Federal Trade Commission (FTC) as well as stronger legal remedies for employer collusion and unlawful monopsony that suppresses workers' wages.").

50 Leydecker, *A Different Curse: Improving the Antitrust Debate About "Bigness"*, 18 N.Y.U. J.L. & Bus. at 880 (stating that "critics point out the lack of Neo-Brandeisian consensus surrounding a new replacement theory for the [consumer welfare standard] and [that] many questions still remain about how reformers would handle certain issues.").

51 Steinbaum & Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. Chi. L. Rev. at 596.

52 *Id.*

53 *Id.* at 602.

54 William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, Antitrust, Summer 2021, at 46.

III. CHIEF JUSTICE WHITE AND JUSTICE HARLAN: TEXTUALISM AND THE SHERMAN ACT IN SIMPLICITY

Contending that the Sherman Act is easy to understand and apply may seem a difficult argument to sustain given the disagreement between Chief Justice White and Justice Harlan as to whether the statute means literally to ban every contract, combination, conspiracy, or corporate practice that harm competition or tends to encourage monopoly. Textualism suggests, however, that both Justice Harlan and Chief Justice White are correct. The harmony between their two positions illustrates the burden of proof in an antitrust case, and the method by which antitrust plaintiffs prove antitrust harms. The Sherman Act applies literally to every course of business conduct which harms competition, but enforcers and plaintiffs must nevertheless prove by a standard of reason that their challenge to that conduct does, in fact, harm competition. To do so, they must elaborate on the statute's obvious goals to articulate why their challenge is reasonable by describing a theory of competition which underlies discussion of anticompetitive harms. This bedrock, though often unarticulated, doctrine of antitrust law is the Elaboration Principle.

Despite being set against one another as the defining disagreement of early antitrust law, Justice Harlan and Chief Justice White's views of the Sherman Antitrust Act are consistent both with each other and with a textualist reading of the statute. Justice Harlan emphasized that the Sherman Act's text bans "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states."[55] This observation is unremarkable, and reflects only the commonsense notion that words in statutes should be given their normal meaning unless the text indicates otherwise.[56] There is nothing to indicate that the framers of the Sherman Act intended the statute's "every" to mean anything but its ordinary meaning, and, even if there was some alternative understanding of the word, the text itself is plain. In this sense, Justice Harlan's reproof to the *Standard Oil* majority to implement the obvious will of Congress is unremarkable and incontrovertible.

Chief Justice White's position that judges must interpret the Sherman Act in harmony with reason is similarly uncontroversial. As Justice Antonin Scalia once wrote, "[a]dhering to the fair meaning of the text (. . .) does not limit one to the hyperliteral meaning of each word in the text."[57] Instead, he explained, "[t]he full body of the text contains implications that can alter the literal meaning of individual words."[58] Justice White's consistent command to interpret the Sherman Act by the "rule of reason" is therefore consistent with Justice Harlan's apparently literal meaning of the statute: every contract, combination, or conspiracy which restrains trade, or, in modern terminology, harms competition, violates the statute, but only if it can be reasonably maintained that it does, in fact, harm competition.

Courts have long claimed that courts must read the Sherman Act as if it were a constitutional provision to be interpreted with common law adaptability.[59] A brief aside into constitutional law will therefore be a worthwhile comparison to the Sherman Act to demonstrate the simplicity of its meaning. The First Amendment of the United States Constitution reads in relevant part that "Congress shall make no law . . . abridging the freedom of

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55 *Standard Oil Co.*, 221 U.S. at 86 (Harlan, J., concurring in part and dissenting in part) (quoting *Trans-Missouri Freight Ass'n*, 166 U.S. at 312 (emphasis in original).

56 *See* Antonin Scalia and Byron Garner, Reading Law: The Interpretation of Legal Texts (2012 69 (writing that "[t]he ordinary meaning rule is the most fundamental semantic rule of interpretation. . . . Interpreters should not be required to divine arcane nuances or to discover hidden meanings."); Gibbons v. Ogden, 22 U.S. 1, 188, 6 L. Ed. 23, 71 (1824) (stating that "[a]s men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.").

57 Scalia and Garner, Reading Law 356.

58 *Id.*

59 Appalachian Coals v. United States, 288 U.S. 344, 359-60, 53 S. Ct. 471, 474, 77 L. Ed. 825 (1933) (stating that "[a]s a charter of freedom, the [Sherman] act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

speech."[60] Any person who reads this provision of the Constitution can understand its meaning: the government is not to interfere with the ability to speak one's mind. Free speech is, therefore, a relatively easy concept for one to understand in the abstract. In any case challenging a law or government action under the amendment, however, a law enforcer must elaborate on the sparse text through appeals to the effects that free speech has on the population living under those effects and the text that describes them. A prohibition on abridging free speech might seem to forbid a law proscribing nude dancing, but a reasonable reading of the constitutional provision assures us that this is not the case because most reasonable people would not describe nude dancing as speech.[61] The First Amendment's text alone, similarly, might not forbid a law which banned letter writing rather than oral, but a reasonable reading of the constitutional provision would certainly not abide by such a notion. Blanket prohibitions in statutes and constitutional provisions require reasonable elaboration in individual cases to determine whether the conduct challenged truly falls within the prohibition's textual ambit.[62]

The Sherman Act's ban on business conduct which harms competition is likewise easy to understand. Competition and its promise of rivalrous business interaction are easy for anyone to comprehend in the abstract; discerning whether something actually harms competition in an individual case requires refining one's understanding of competition itself and its accompanying benefits through elaboration and evidence. Critics of Justice Harlan's view of the Sherman Act, even Chief Justice White himself, often present a strawman which suggests that he was unaware of this fact. They contend, for example, that reading the statute textually would ban nearly every contract between businesses.[63] This misstates Justice Harlan's position, however. An anodyne contract between businesses would not harm competition by any reasonable sense of the word, just as a ban on nude dancing would not reasonably violate a prohibition on abridgements of free speech. Justice Harlan was correct in that the intent of Congress was for the statute to sweep widely, and to cover literally every contract, combination, conspiracy, or corporate practice which restrained trade.[64] Chief Justice White was, however, correct that courts must apply the "rule of reason" to it as they do all broadly worded constitutional provisions to give it the reasonable meaning its text must bear.

While Justice Harlan's and Chief Justice White's positions are harmonious, the perception of disagreement persists because of how subsequent courts, and even Chief Justice White himself, described his innovation of the rule of reason. If there is a disagreement between the two justices, it is about only the way in which the Court described the relevant standard of proof. Chief Justice White wrote in another 1911 antitrust case, *American Tobacco*, that the rule of reason ensured that the Sherman Act "only embraced acts or contracts

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60 U.S. Const. amend. I.

61 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991). The fact that this case had four dissenters, admittedly, makes this argument a bit weaker. The four justices who dissented in this case, however, advocated for theories of statutory interpretation generally held in low regard today, and most agree that nude dancing as an action does not, by itself, fit into a reasonable definition of speech.

62 If this example is too legalistic, consider a more commonplace one. Men go to barbers every month, yet often have difficulty describing what they want their cut to be. They understand the general concept, technique, and image of haircut, and may be able to picture what they want their hair to look like, but lack the words to describe that. A barber, seeking to elaborate on his product, may offer to give his customer a "business cut." While this description does not identify the extent of the product itself, it is a useful elaboration: it conveys to the man that the barber will cut his hair to a conservative length that indicates respectability. Just as the business cut elaborates on the haircut, the consumer welfare standard elaborates on competition.

63 *Standard Oil Co.*, 221 U.S. at 63 ("[t]o hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree combine in any respect whatever as to subjects embraced in interstate trade or commerce"); *cf.* David Ramsey, Antitrust and the Supreme Court 17–18 (2012) (arguing that "[Harlan's] reading of the Sherman Act attributes to Congress intention to dramatically change the nature of American commerce . . . in a single stroke, , effectively preventing further consolidation of businesses").

64 *Cf.* Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law' Nature of Antitrust Law*, 60 Tex. L. Rev. at 662-63 (arguing that antitrust laws are "broadly phrased—almost constitutional in quality—embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments. In failing to provide more guidance, the framers of our antitrust laws did not abdicate their responsibility any more than did the Framers of the Constitution. The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.").

or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade."[65] He clarified, however, that the rule of reason "held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable," but rather that "the general character of the term 'restraint of trade,' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce, the free movement of which it was the purpose of the statute to protect."[66] In other words, the question is not whether the restraint itself was unreasonable in its harm to competition, but rather whether the challenged restraint could reasonably be said to harm competition.

Later Supreme Court interpretations of the statute have maintained an asserted focus on competition, even amidst challenges to its viability as wise policy. Justice Oliver Wendell Holmes stated in an early dissenting opinion that, contrary to all evidence, "the [Sherman] act says nothing about competition."[67] This statement is ironic because Justice Holmes nevertheless "constru[ed] selected parts of it in terms of competition."[68] Though the statute does not mention the word competition itself, its importance to the questions of restraint of trade and monopoly have made it inescapable. Indeed, the Court stated in *Board of Regents of University of Oklahoma* that all doctrinal features of antitrust law such as the rule of reason and per se illegality are but ornaments used to discern harms to competition: "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[69] Stripped of complicated doctrinal veneer, the scope of the Sherman Act becomes extremely simple as both Justice Harlan and Chief Justice White recognizes: the statute bans all business actions which one could fairly say harm competition.

IV. THE ELABORATION PRINCIPLE: BEFORE ANTI-COMPETITIVE HARM, THERE MUST BE COMPETITION

If competition is the evident policy of the Sherman Act, courts have not been forthcoming as to what the term itself means. The language with which most modern case law describes the fundamental inquiry of the Sherman Act is ambiguous and often insufficiently descriptive. The Supreme Court has described the rule of reason as an inquiry into whether "the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[70] They have stated, similarly, that applying the rule of reason requires a burden shifting approach in which "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect," and should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint."[71] Neither of these descriptions are very helpful for those trying to discern harms to competition, however, because they dodge the fundamental question: what is competition?[72] What are its contours? How do we know that a restraint's effects may benefit or hinder competition if we have no lexicon with which to describe it? The consumer welfare standard provides both answers to each of these questions and a lexicon of competition which elaborates on the concept. This is the essence of the Elaboration Principle.

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65 United States v. Am. Tobacco Co., 221 U.S. 106, 179, 31 S. Ct. 632, 648, 55 L. Ed. 663 (1911).
66 *Id.* at 179–80.
67 *Northern Securities*, 193 U.S. at 403 (Holmes, J., dissenting).
68 Robert Bork, The Antitrust Paradox 27 (1978).
69 Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104, 104 S. Ct. 2948, 2961, 82 L. Ed. 2d 70 (1984).
70 F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 2017, 90 L. Ed. 2d 445 (1986) (quoting in full Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)).
71 *Alston*, 141 S. Ct. at 2160 (Internal citations omitted).
72 As Judge Frank Easterbrook observed over forty years ago, "[p]art of the difficulty in antitrust comes from ambiguity in what we mean by competition." Frank H. Easterbrook, *Limits of Antitrust*, 63 Texas Law Review 1, 13 (1984).

Determining whether a restraint has anticompetitive effects implicitly requires an oft-neglected initial step: elaborating on the concept of competition itself by describing its qualities, conditions, and effects in reasonable language. A practical example clarifies this process. Per se antitrust offenses are business practices "that would always or almost always tend to restrict competition and decrease output," and therefore allow no inquiry into the level of reasonableness for the individual restraint.[73] Price fixing between horizontal business rivals is a per se offense, and has been consistently described as one.[74] The intuition that price fixing harms competition is obvious: if rivals fix prices, they will not be able to outdo each other to win market share and customers by offering more economically advantageous prices for those customers. In so articulating, one has implicitly offered an elaboration on the concept of competition by describing one of its qualities: competition tends to lead to price differentiation, an obvious boon for consumers. By elaborating on competition in this way, one can demonstrate that price fixing violates the Sherman Act, which bars all business practices that harm competition, by showing that it hinders this feature of competition. In other words, antitrust plaintiffs must articulate an ideal state of competition and compare it to the evidenced effects that the restraint has on that idealized state of competition.

Elaborating on competition in this way enables antitrust plaintiffs to describe violations of the Sherman Act to the relevant audience of generalist judges. As many commentators have pointed out, the federal judges are unlearned in the economics often used to prove violations of antitrust law.[75] Effective elaboration on the concept of competition is the key to effective antitrust advocacy before such judges. Indeed, though case law does not describe this directly as a feature of doctrine, a generalist judge will not likely accept an antitrust plaintiff's case regarding a challenged restraint's anticompetitive effects unless they find that the plaintiff's elaboration on competition is reasonable. The apparent disagreement between Justice Harlan and Chief Justice White illustrates why: though the Sherman Act does prohibit literally every business practice which harms competition, most generalist judges, laymen, or even economists would not accept as reasonable a definition of competition which saw competition harmed with every anodyne contract between businesses with small market share. A reasonable elaboration on the concept of competition understandable by a layman is, therefore, essential to proving anticompetitive injury in an antitrust case.

Establishing a reasonable lexicon of competition has a demonstrable effect on one's fortunes in an antitrust case. One prominent study suggested that training judges on antitrust economics allows them to better understand the antitrust cases before them, though with diminishing returns in more complex antitrust cases.[76] Juries hearing antitrust cases lack such economic training, but grasp the economic principles behind the cases intuitively in cases prosecuted successfully.[77] The insight from both trends is the same: proving anticompetitive effects depends upon how well parties can elaborate upon the concept of competition to the decisionmaker. Appropriately enough, one cannot prove anticompetitive harm to a judicial decisionmaker without a well-articulated explanation of what competition is in the first place. This requires language that identifies the relevant actors in competition, its ideal ends, and other relevant features understandable to the judge, jury, and even lawyers.

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73 Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988) (Internal quotations omitted).

74 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24, 60 S. Ct. 811, 844, 84 L. Ed. 1129 (1940).

75 *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 Cal. L. Rev. 1, 35 (2008) (observing that "it would be surprising if the average layperson understood the complex econometrics, statistics, and economic theory that are the bread and butter of the modern antitrust trial," and that "[a]s antitrust has become economically more sophisticated, generalist trial judges struggle to keep up as well."); Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & Econ. 1, 2 (2011) (stating that "[t]he effects-based structure of modern antitrust law requires economic expert testimony in large part because the Sherman Antitrust Act's broad language delegates to the judiciary the task of identifying unreasonable restraints of trade. This task can be daunting for a generalist judge grappling with questions involving merger simulations, demand elasticity, critical loss analysis, the competitive effects of horizontal mergers, or vertical restraints and evaluating conflicting econometric analyses."); Justin Hurwitz, *Administrative Antitrust*, 21 Geo. Mason L. Rev. 1191, 1229 (2014) (opining that "[i]t is certainly the case that antitrust matters, especially in regulated industries, challenge the abilities of generalist judges," and that "there is some evidence that, absent specialized training, complex antitrust is "too complicated" for generalist judges.").

76 *See* Baye and Wright, *Is Antitrust Too Complicated for Generalist Judges?*, 54 J.L. & Econ. at 4.

77 *See* Garry A. Gabison, *Juries Can Quick Look Too*, 10 Seton Hall Circuit Rev. 271, 305 (2014) (noting that "[m]ost jurors are unable to spout economic theory, but they intuitively understand many of the fundamentals of economic theory from everyday experiences.") (quoting John M. Majoras, *You Too Can Win Antitrust Cases: The Myths and Realities of Trying an Antitrust Case to a Jury*, Antitrust Source 1, 2 (2009)).

The consumer welfare standard and all other proposed antitrust welfare standards act as elaborations on competition to explain the concept to judges, laymen, and all other relevant actors in individual antitrust cases. The consumer welfare standard makes a descriptive claim: that relevant antitrust actors can elaborate on the ideal competitive outcomes desired by the Sherman Act through the terms of price theory and how the challenged restraint affects consumers.[78] In a competitive market, the firms with the same or similar products will strive against each other to offer the best prices to those who buy their products, innovate to maintain an advantage in future markets against their competitors, and maintain quality to ensure that customers will not abandon their firm in response to shortcomings.[79] This elaboration on the concept of competition identifies the relevant actors who stand to benefit from competition (consumers), articulates a basic measure of harm to that group (rising prices), and, perhaps most importantly, does so in a way that is easy to comprehend and conceptualize.

Neo-Brandeisians suggest that the consumer welfare standard is not as easy to understand and administer as its proponents suggest. Assistant Attorney General for Antitrust at the Department of Justice Jonathan Kanter quipped, for example, that "if you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers."[80] This critique has obvious merit, as many consumer welfare standard advocates have admitted that the consumer welfare standard lacks complete clarity in this regard.[81]

Judges and antitrust lawyers, however, need not worry about the exact specificity in articulating when to pursue an antitrust prosecution under the consumer welfare standard. The consumer welfare standard is important to these actors not because it provides an exact evidentiary standard of proof, but because it provides general language and concepts by which antitrust lawyers can elaborate on competition to the judge. As judges, jurors, and even most lawyers are generally unfamiliar with terms and concepts through which economists and industrial organization scholars understand competition, the consumer welfare standard's broad-stroke conception of competition producing price differentiation for the benefit of consumers gives them both the words they need to describe harms to competition.[82]

The language judges use in antitrust cases supports this characterization. One need not catalogue every use of consumer-focused language in antitrust opinions since Robert Bork introduced the concept to establish

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78 *See, e.g.*, Hosp. Corp. of Am. v. F.T.C., 807 F.2d 1381, 1386 (7th Cir. 1986) (stating through consumer welfare standard advocate Richard Posner that "the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws," which requires courts to "make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level."); In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.., 44 F.4th 959 (10th Cir. 2022) (writing that "with the adoption of the consumer welfare standard, antitrust became indifferent to the preservation of inefficient competitors" because a "consumer has no interest in the preservation of a fixed number of competitors greater than the number required to assure his being able to buy at the competitive price.") (quoting Marrese v. Am. Acad. of Orthopaedic Surgeons, 706 F.2d 1488, 1497 (7th Cir. 1983) (Posner, J.)).

79 Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. 65, 67 (2019) (writing that the consumer welfare standard's "overall goal is clear . . . to encourage markets in which output, measured by quantity, quality, or innovation, is as large as possible consistent with sustainable competition.").

80 Jonathan Kanter, Remarks at New York City Bar Association's Milton Handler Lecture, Department of Justice (May 18, 2022), available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

81 *See, e.g.,* Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. at 66 (writing that Robert Bork, the intellectual founder of the consumer welfare standard, "adopted a version of [an efficiency-centric] conception of welfare, except that he misnamed it 'consumer welfare[,]' [but] [b]y contrast, under the consumer welfare ("CW") principle, as most people understand it today antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low."); Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. at 347-48 (observing that "[t]he Supreme Court has stated that antitrust is a 'consumer welfare prescription,' and cited Judge Bork's book in doing so. In light of the general difficulty that courts have with economic terminology . . . it is unclear if the Court even understood that Judge Bork was effectively re-defining the term "consumer welfare" to mean something very different.").

82 *See, e.g.*, Murat C. Mungan. and John M. Yun, *A Reputational View of Antitrust's Consumer Welfare Standard* (March 28, 2023). Houston Law Review, Vol. 61, pp. 569–611, 2024, George Mason Law & Economics Research Paper No. 23-05, Texas A&M University School of Law Legal Studies Research Paper No. 23-11, Available at SSRN: https://ssrn.com/abstract=4403344 (illustrating that consumer-based articulations of competition and the harms that result sends a clear and easy-to-read signal to the market, laypeople, and even judges as to harms to competition by stigmatizing companies that violate the law in an easily understood way).

its importance. Besides the well-known Supreme Court dictum that "Congress designed the Sherman Act as a 'consumer welfare prescription,'"[83] lower courts have gone so far as to say that "the primary aim of antitrust . . . is compensating consumers, not policing corporate conduct."[84] Consumer welfare standard language has obviously become the dominant lexicon through which judges describe the statute, such that harm to consumers has become "the antitrust laws' traditional concern."[85] It makes a great deal of sense, therefore, that lower court judges frequently use consumer-focused language in their opinions related to antitrust cases which focus on consumer harms.

Less justifiable, however, is the fact that judges use consumer-focused language in other antitrust cases which have little or nothing to do consumer harm. Judges have applied the antitrust laws consistently, if infrequently, to labor-side antitrust violations.[86] When they do, however, they consistently interpolate consumer-focused language into their opinions. In *Alston*, the Supreme Court heard a challenge by college football players against a National Collegiate Athletic Association ("NCAA") regulation which restricted compensation that individual colleges could pay their student-athletes.[87] Though the challenged restriction was evidently a labor-side business restraint, the Court spent a significant part of its decision discussing the consumer-side effects of the measure. It even went so far as to quote prior case law which described the rule of reason exclusively in consumer-demand terms rather than restating it in terms of labor markets.[88] The Court also included a final reproof to judges to "be mindful . . . of their limitations . . . as generalists, as lawyers, and as outsiders trying to understand intricate business relationships" when using "the heavy hand of judicial power when it comes to enhancing consumer welfare."[89]

Why did the Supreme Court speak of the judge's role in an antitrust case with language which referenced consumers exclusively at the end of a case which had little to do with them? Two intertwined reasons indicate why. First, and superficially, the NCAA argued that the challenged labor-side restraint had a demonstrable pro-consumer effect which enhanced competition.[90] The NCAA contended that "its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports."[91] The Supreme Court did not find this argument persuasive because the NCAA's definition of amateurism was inconsistent, and it was unclear whether consumers chose to watch college football over competitors like professional football because of some ill-defined sense of that amateurism.[92]

The NCAA made this argument, however, for the second reason that the Court spent a considerable amount of time discussing it: consumer-focused language is the primary manner through which lawyers in antitrust cases have elaborated on competition, and also the primary manner in which judges have understood and written about competition. As the Supreme Court established in *National Society of Professional Engineers*,

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83 *Reiter*, 442 U.S. at 343.
84 In re Relafen Antitrust Litig., 221 F.R.D. 260, 277 (D. Mass. 2004); *see also* Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) ("The antitrust laws protect efficient production for the benefit of consumers"); Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 9 (1st Cir. 2001) (doubting whether a dealer protection statute was classified properly as an antitrust statute because "[t]he central aim of the antitrust laws is to protect consumers against certain abusive business practices—especially price-fixing and monopoly.").
85 *Brooke Grp.*, 509 U.S. at 221.
86 *See* Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) (applying antitrust laws to a dispute between a major league baseball player and the league, though ultimately refusing to do so because of a case-law exemption for the sport); Alston, 141 S. Ct. at 2151 (applying the antitrust laws to a dispute between an NCAA athlete and the college athletic association itself); Robert J. Enders, *Federal Antitrust Issues Involved in the Denial of Medical Staff Privileges*, 17 Loy. U. Chi. L. J. 331 (1986) (describing the long history of case law denying and supporting challenges by doctors to hospitals that refused admission for them to practice in the hospital).
87 *Alston*, 141 S.Ct. at 2147.
88 *Id.* at 2160 (stating that the purpose of the rule of reason is to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.") (quoting *American Express Co.*, 138 S.Ct., at 2284).
89 *Id.* at 2166.
90 *Id.* at 2152.
91 *Id.*
92 *Id.* at 2163.

parties must make their arguments exclusively in reference to competition in Sherman Act cases.[93] The consumer welfare standard provided the linguistic tools for the NCAA to argue as to that policy, and the Supreme Court spent considerable time discussing what was a rather weak argument[94] in defense of an anti-competitive labor-side restraint because the consumer-side language is the most well-accepted elaboration on the Sherman Act's theory of competition. The NCAA, in turn, used consumer-focused competitive elaborations as its primary argument before the Supreme Court despite the challenged restraint being labor-side because consumer-side tools are the lexicon of competition. That the Supreme Court was not persuaded by it illustrates only the weakness of the argument itself.

Nor is the NCAA's argument in *Alston* an exception to this rule. When it first challenged wage fixing and no poaching agreements criminally, the DOJ's non-binding guidance explained their cases by analogy to the consumer welfare standard's elaboration on competition. Its "Antitrust Guidance for Human Resource Professionals" argued that naked wage fixing and no poach agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[95] The consumer welfare standard explained competition as a process which benefitted from price competition among rivals and which agreements on price harmed; the Department of Justice explained their new enforcement choices by using the familiar language to describe competition, but supplemented that language with other elaborations on competition for labor markets. These explanations were evidently successful: Justice Kavanaugh's *Alston* concurrence stressed the need for antitrust law to police wage fixing as harshly as price fixing, and used the same comparison to the consumer welfare standard's explanation of competition as the DOJ and FTC to underscore his point.[96]

The consumer welfare standard has provided judges and antitrust lawyers with a reasonably understandable elaboration on and dialect to discuss competition. While even the Supreme Court has recently accepted application of the Sherman Act to labor markets uncritically, it nevertheless relied in large part on the consumer welfare standard's dialect to explain why it so readily applied the Sherman Act to explain why it did so. The NCAA, for its part, used consumer welfare language as the primary competitive argument during the case. Both illustrate the great utility the consumer welfare standard's language has for both antitrust actors, reflects what a successful elaboration on competition it has become, and suggests how useful it has been even in more innovative applications of the Sherman Act. Its ubiquity has made the consumer welfare standard a synecdoche for competition in the minds of both judges and some practitioners; though they know that it is merely a part which represents a whole, it has become so associated with the Sherman Act's policy of competition as to be the language of competition itself.

V. THE QUEST FOR NEW STANDARDS: SUPPLEMENTARY RATHER THAN OPPOSITIONAL

Commentators suggest that antitrust law requires a new standard to replace the apparently ailing consumer welfare standard.[97] This suggestion is at least partially flawed because, while the consumer welfare standard's

93 *Nat'l Soc. of Pro. Engineers*, 435 U.S. at 696.

94 *Alston* was a 9-0 decision, and, as Justice Kavanaugh wrote in his dissent, "[t]he NCAA's business model would be flatly illegal in almost any other industry in America" under the antitrust laws. *Alston*, 141 S.Ct. at 2167 (Kavanaugh, J., concurring).

95 Antitrust Guidance for Human Resource Professionals, *supra* n. 14 at 4.

96 *Alston*, 141 S.Ct. at 2167-68 (Kavanaugh, J., concurring) (arguing that "Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.") (Internal citations omitted).

97 *See generally* Khan, *supra* n. 44; Jesse Solomon, Gregory S. Morrison, Doni Bloomfield, *Consumers and Citizens: The Future of the Consumer Welfare Standard in Global Merger Review*, 84 Antitrust L.J. 265 (2021) (discerning a decline in the influence of the consumer welfare standard on merger review in the United States); Christine S. Wilson, Thomas J. Klotz, Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare*

claim regarding antitrust's exclusively economic goals requires obvious opposition to Neo-Brandeisian views of the limits of antitrust law, the consumer welfare standard's elaboration on competition requires no such opposition. The consumer welfare standard's elaboration on competition encompasses only one aspect of the Sherman Act's policy. It must therefore be supplemented to describe competition to generalist judges in ever-more innovative ways to prosecute harms to that competition successfully. While the consumer welfare standard's elaboration on competition may suffice to explain harms to competition in many cases, supplementary standards which expand on this valuable work will be necessary to detect harms to competition less directly tethered to consumer interests. The Elaboration Principle demands less opposition between standards than the dominant rhetoric suggests.

The consumer welfare standard has two primary aspects: its explanation of competition through consumer interests and price theory and its Borkean claim that antitrust should focus exclusively on the interests of consumers.[98] The former should be unobjectionable even to Neo-Brandeisians. They argue not that consumer interests should be excised entirely, but rather that contemporary cases limit antitrust analysis inappropriately to a truncated view of their interests.[99] For all their opposition to the consumer welfare standard, they have used its explanation of competition to attempt to block several prominent mergers.[100] The latter is, however, a point upon which there can be no accommodation: if consumer interests are the only relevant factor in deciding harm to competition in an antitrust case, supplementing the consumer welfare standard with other elaborations on competition is at best unnecessary and at worst a waste of valuable resources. If this aspect of the consumer welfare standard is inseparable from it, the Neo-Brandeisians that oppose it must also support jettisoning the standard.

Evaluating this latter point of contention requires distinguishing between the consumer welfare standard in antitrust law enforcement and antitrust law administration in the courts. The consumer welfare standard's statement of goals has had an obvious and outsized impact on broad agency-level enforcement decisions.[101] The enforcers at the helm of the DOJ and FTC have long expressed belief in the consumer welfare standard's statement of goals, [102] and there was little evidence until recently that their broad enforcement policies

Standards: Reinserting the Total Welfare Standard into the Debate, 26 Geo. Mason L. Rev. 1435 (2019) (arguing, albeit from a more conservative perspective, for a change in the relevant welfare standard used in antitrust law); Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, 1 ANTITRUST CHRON. 12, 13 (2018) (arguing for a Neo-Brandeisian-aligned antitrust standard); Sophie Copenhaver, *Big Tech Is Why I Have (Anti)trust Issues*, 95 St. John's L. Rev. 869 (2021) (arguing for a change in antitrust standard to a simplified "a two-part test, focusing on the market power and any anticompetitive business practices of the defendant corporation.").

98 *See* Hovenkamp, *supra* n. 35; Kirkwood and Lande, *supra* n. 36.

99 *See* Khan, *supra*, at 737 (contending that "the present [consumer welfare standard] fails even if one believes that antitrust should promote only consumer interests. Critically, consumer interests include not only cost but also product quality, variety, and innovation. Protecting these long-term interests requires a much thicker conception of 'consumer welfare' than what guides the current approach. But more importantly, the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends--including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e., whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e., whether consumers are materially better off)."); Tepper and Hearn, *supra,* at

100 *JetBlue Airways Corp.*, No. CV 23-10511-WGY, 2024 WL 162876 (D. Mass. Jan. 16, 2024) at *3 (successfully challenging a merger between JetBlue Airways and Spirit Airlines because "the consumers that rely on Spirit's unique, low-price model would likely be harmed."); Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892, 919-20 (N.D. Cal. 2023) (unsuccessfully challenging a merger between Facebook holding company Meta and VR fitness company Within using the hypothetical monopolist test, a consumer welfare standard-oriented method of showing harm to competition).

101 *See* Thomas O. Barnett, Maximizing Welfare Through Technological Innovation, Department of Justice (Oct. 31 2007) at 1–5, available at https://www.justice.gov/atr/file/519216/download (discussing consumer surplus and producer surplus, their effect on price, and how this is the sole goal of antitrust enforcement); Statement of Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, before the Antitrust Modernization Comm'n (March 21, 2006) (stating that the goal of antitrust enforcement is to "protect and enhance competition and consumer welfare"); "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," Federal Trade Commission (Aug. 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section-5enforcement.pdf (stating that the "public policy underlying the antitrust laws, namely, the promotion of consumer welfare," guided the Commission's use of its potentially broad "unfair methods of competition" powers under Section 5 of the Federal Trade Commission Act).

102 *See id.*, *see also* Solomon, Morrison, and Bloomfield, *Consumers and Citizens: The Future of the Consumer Welfare Standard in Global Merger Review*, 84 Antitrust L.J. at 284 (noting that, while antitrust agencies' "application of the standard has not been entirely consistent over time" because "Republican administrations have, on average, issued fewer second requests and challenged a smaller proportion of mergers than Democratic administrations," the "U.S. antitrust agencies have consistently championed consumer welfare maximization as the goal of competition law").

were guided by a different standard or enforcement ethic even if different presidential administrations' results varied.[103] Indeed, Judge Richard Posner, an advocate for the consumer welfare standard's exclusively economic goal, famously dropped the subtitle from the second edition of his book *Antitrust Law: An Economic Perspective* because, as he wrote, "the other perspectives ha[d] largely fallen away."[104] The consumer welfare standard has obviously been extremely important to antitrust enforcers in guiding broad antitrust policy.

The consumer welfare standard's impact on judges and rank and file antitrust lawyers is more equivocal, at least as to its statement of goals. A Westlaw search of the term "consumer welfare standard" reveals that only four cases have quoted the exact phrase.[105] The first case to do so came only in 2017.[106] This bare statistic is, of course, a very superficial measurement of the consumer welfare standard's impact on judges. It is surprising, however, that judges have used the common name for such an apparently basic feature of the doctrine so infrequently, especially because Robert Bork championed the term as early as 1964.[107] Courts have also not given efficiencies, which Robert Bork and many consumer welfare standard-aligned enforcers champion as a vital part of merger review,[108] nearly as much weight as anti-consumer welfare standard activists suggest.[109] The Supreme Court's oft-cited dicta that "Congress designed the Sherman Act as a 'consumer welfare prescription'" is likewise less unequivocal than it may first appear.[110] Even if this was Congress's intention, the Sherman Act's language sweeps broadly to include all harms to competition and abuse of monopoly power; prosecutors must enforce the text Congress enacted, not its intentions for that text.[111]

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103 Solomon, Morrison, and Bloomfield, *Consumers and Citizens: The Future of the Consumer Welfare Standard in Global Merger Review*, 84 Antitrust L.J. at 293-94 (discussing the Trump administration's perceived-to-be political decisionmaking in deciding whether to approve or oppose the Bayer-Monsanto and AT&T-Time Warner merger as evidence that the consumer welfare standard's decline as the guiding influence of antitrust merger review).

104 Richard Posner, Antitrust vii (2d ed. 2001).

105 *In re EpiPen Sales Pracs. & Antitrust Litig.*, 44 F.4th at 985 ("To delineate between permissive and prohibited exclusionary contracts, we need some guiding principle—some standard that allows us to quickly and easily resolve whether exclusive contracts harm competition. In our Circuit, this is the consumer welfare standard."); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (MKB), 2024 WL 278565 (E.D.N.Y. Jan. 25, 2024) at *30 ("Under either a consumer welfare standard or social welfare (economic efficiency) standard, formation of the cartel has led to a decrease in welfare.") (internal citations omitted); United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) ("Specifically, Anthem maintains the district court improperly rejected a consumer welfare standard—what it calls 'the benchmark of modern antitrust law,' id.—and generally abdicated its responsibility to balance likely benefits against any potential harm.") (internal citations omitted); United States v. AT & T Inc., 310 F. Supp. 3d 161, 220 n. 32 (D.D.C. 2018) ("In the Court's view, however, it is worth noting that the Government's retreat from Professor Shapiro's model cannot be squared with Professor Shapiro's testimony (seemingly approved by the Government) that to perform a valid 'vertical merger analysis' under the applicable 'consumer welfare' standard, it is necessary to 'balance' or 'tradeoff' the merger's proconsumer benefits with any predicted consumer harms.").

106 *See id.*

107 Testimony of Robert H. Bork, "Antitrust in Dubious Battle," 4925 (1964) Economic concentration. Hearings before the subcommittee on antitrust and monopoly of the committee on the Judiciary, United States Senate, Eighty-eighth, Eighty-ninth, Ninetieth and Ninetieth-first Congresses first-second sessions ... Part 8, available at https://heinonline.org/HOL/Page?collection=congrec&handle=hein.cbhear/cbhearings13292&id=401&men_tab=srchresults ("Consistent with the consumer-welfare standard, it is *market* concentration, not economy-wide concentration, that is the subject of the Clayton Act's provisions concerning "competition" and "monopoly.") (emphasis in original).

108 *See* 2010 Horizontal Merger Guidelines, Federal Trade Commission and Department of Justice (2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (outlining that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."); Harry First, *American Express, the Rule of Reason, and the Goals of Antitrust*, 98 Neb. L. Rev. 319, 324-25 (2019) (stating that Robert Bork "viewed consumer welfare as synonymous with 'economic efficiency,' and . . . used economic reasoning (via price theory) to achieve it."). This characterization of Bork's views is not completely accurate, as he rejected the efficiencies defense to merger enforcement in one of his early writings. *See* Robert H. Bork and Wade S. Bowman, Jr., *The Crisis in Antitrust*, 65 Colum. L.Rev. 363, 373 (1965). There is no doubt, however, that he is associated with advocacy in favor of the concept of efficiencies as a relevant factor in antitrust law.

109 *See, e.g.,* Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 789 (9th Cir. 2015) (commenting that, while "the Sixth, D.C., Eighth, and Eleventh [circuits] have suggested that proof of post-merger efficiencies could rebut a Clayton Act § 7 prima facie case. . . . none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense; thus, even in those circuits that recognize it, the parameters of the defense remain imprecise."); F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (writing that "[a]lthough the Supreme Court has not sanctioned the use of the efficiencies defense in a section 7 case . . . the trend among lower courts is to recognize the defense," but noting also that "[t]hese courts, however, generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.") (quoting ABA Antitrust Section, *Mergers and Acquisitions: Understanding the Antitrust Issues* 152 (2000)); Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. Pa. L. Rev. 1941, 1957 n. 75 (2020) (commenting that "[l]awyers and courts continue to debate whether an efficiencies defense even exists").

110 *Reiter*, 442 U.S. at 343.

111 Conroy v. Aniskoff, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring) (stating that "[w]e are governed by laws, not by the intentions of legislators.").

Courts' use of the consumer welfare standard is much more consistent with its second function of elaborating competition. As stated previously, courts tend to use consumer-focused language even in antitrust cases where consumers are at the margins of the competitive analysis.[112] While this suggests that they understand competition through this elaboration, some merger challenge decisions hint that they could accept a broader dialect. In *Federal Trade Commission v. Penn State Hershey Medical Center*, the United States Court of Appeals for the Third Circuit overturned a district court decision which blocked the FTC's challenge to a hospital merger in Harrisburg, Pennsylvania.[113] It did so because the district court used a method of determining the relevant geographic market that differed from the more common consumer welfare standard-aligned hypothetical monopolist test, which develops a geographic market based upon a location in which a firm exercising monopoly power could impose an increase in consumer prices without meaningful competitive opposition.[114] While it noted that the hypothetical monopolist test was a "common method employed by courts and the FTC to determine the relevant geographic market" in a merger case, the court did not imply that it was the only acceptable one, or that a test divorced from consumer interests could be rejected automatically.[115] It rejected the alternative test only because it did not align with contemporary economic learning.[116] The court instead emphasized that the statute merely required enforcers to show that the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly."[117]

The message underlying *Penn State Hershey* and similar cases is clear: the hypothetical monopolist test is but one possible method of proving harm to competition. If enforcers developed another one, enforcers could use it too to block mergers as anticompetitive. The sentiment expressed by the Third Circuit is not unique, and reflects courts' general trend to view the consumer welfare standard as an elaboration of competition rather than as an exclusive statement of goals.[118] The fact that the Supreme Court has not decided an antitrust merger challenge case in nearly fifty years limits the foregoing analysis's utility as a statement of doctrine somewhat, but the antitrust laws' text could not be more clear: competition is the relevant standard of review.[119] There is no reason under the statutes, or for that matter Supreme Court case law, why enforcers could not develop a new test based on a non-consumer centric elaboration of competition consistent with the Elaboration Principle. As courts almost uniformly understand competition as elaborated by the consumer welfare standard, however, any new elaborative standard must sufficiently accommodate that understanding.

Antitrust enforcers and plaintiffs must supplement the consumer welfare standard rather than oppose it to administer the Sherman Act's much simpler and broader standard: harm to competition. Those who oppose the proposed alternatives to the consumer welfare standard suggest that courts will not accept them because they run contrary to established law.[120] Those who support a new standard agree, and suggest

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112 *See* n. 81–83, *supra*.
113 Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 333 (3d Cir. 2016).
114 *Id.* at 338.
115 *Id.*
116 *Id.* at 339–40 ("The [alternative] test was once the preferred method to analyze the relevant geographic market and was employed by many courts. But subsequent empirical research demonstrated that utilizing patient flow data to determine the relevant geographic market resulted in overbroad markets with respect to hospitals.") (internal citations omitted).
117 *Id.* at 337 (quoting 15 U.S.C. § 18).
118 *See, e.g.*, *Saint Alphonsus Medical Center-Nampa*, 778 F.3d at 784 (describing the hypothetical monopolist test as only "[a] common method to determine the relevant geographic market" in a merger case); United States v. H & R Block, Inc., 833 F. Supp.2d 36, 51 (D.D.C. 2011) (stating that "[a]n analytical method *often used* by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products") (emphasis added); Fed. Trade Comm'n v. Sanford Health, 926 F.3d 959, 963 (8th Cir. 2019) (commenting that "[t]he district court employed the 'hypothetical monopolist test,' which is *commonly used* in antitrust actions to define the relevant market.") None of these cases suggests that another test based upon a different elaboration of competition would suffice to meet the burden under the statute.
119 Richard J. Pierce, Jr., *Merger Law is Dante's Inferno Revisited*, The Regulatory Review (Mar. 13, 2023), available at https://www.theregreview.org/2023/03/13/pierce-merger-law-is-dantes-inferno-revisited/ ("[T]he U.S. Supreme Court has not issued any decision interpreting and applying Section 7 in 50 years . . .").
120 *See, e.g.*, Dorsey et. al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 Pepp. L. Rev. at 878–79 (criticizing opponents of the consumer welfare standard for ignoring the prior 50 years of case law making antitrust into a "workable, coherent, and objective framework"); Phil Gramm and Christine Wilson, *The New Progressives Fight Against Consumer Welfare*, Wall Street Journal (Apr. 3, 2022 at 5:05 PM ET), available at https://www.wsj.com/articles/the-new-progressives-fight-against-consumer-welfare-de-regulating-antitrust-enforcement-economy-bipartisan-11649017074 (criticizing the Neo-Brandeisians for departing from antitrust case

legislative reform to declare new goals for antitrust law.[121] While there may be merit to certain legislative reforms to antitrust law, the text of the Sherman Act is broad enough to accommodate any potential harms to competition if they can be explained reasonably to harm competition. As should be clear already, the issue is not that judges see redressing harm to consumers as the exclusive goal of antitrust but rather that they understand competition chiefly through the lens and dialect of the consumer welfare standard. Enforcers have already produced promising results by explaining competition in novel ways by analogy to the consumer welfare standard's theory of competition.[122] They have challenged mergers on both traditional consumer-oriented theories of harm[123] as well as more innovative labor-oriented theories.[124] Their success illustrates that judges enforce the Sherman Act's competition standard if enforcers elaborate on competition in a manner in language they understand, namely language based in the consumer welfare standard. While contrasts to the consumer welfare standard has rhetorical value, the record in court is clear for now: practitioners must supplement the consumer welfare standard rather than replace it.

CONCLUSION

Legendary Assistant Attorney General for the Antitrust Division of the DOJ Thurman Arnold once wrote a book called *The Folklore of Capitalism*. The famous Alcoa decision has been called "antitrust's closest equivalent to an epic poem."[125] If antitrust has an epic poem and folklore, it must have language and dialect through which its actors must understand and describe the Sherman Act's central goal of competition. Indeed, enforcers must elaborate on competition to even describe anti-competitive harm. The consumer welfare standard is the dialect with which most antitrust lawyers explain competition and, hence the dialect with which most judges write about it. Though they have shown themselves open to enforcing the plain text of the Sherman Act, which as Chief Justice White and Justice Harlan understood covers all harms to competition, they maintain this language even in labor-side antitrust cases. The consumer welfare standard's description of competition has become a synecdoche for competition itself.

Absent a major legislative change, this trend in the antitrust vocabulary is unlikely to change. As judges hearing antitrust cases seem not to have adopted the consumer welfare standard's statement of exclusively consumer-minded goals, the appropriate course of action is to build upon the judge's understanding of competition rather than seek to replace it. Supplementing the consumer welfare standard rather than replacing it is the best strategy in cases, if not necessarily for enforcers making rhetorical arguments to the public. The public, like judges, understands competition through what it provides for them: simple economic goods in the form of lower prices and innovation. Understanding and advocating for competition in all of its breadth requires accounting for that fact. The consumer welfare standard is the lingua franca of American antitrust lawyers; in speaking the language of competition, the consumer welfare standard is inevitable.

law built from the 1970s).

121 *See, e.g.*, Martha C. White, *Momentum Is Building for Antitrust Reform. Here's What That Means for Big Tech*, Time (Nov. 21, 2021 at 12:51 PM) (describing the proposed legislative changes to the antitrust laws from the outset of the Biden Administration); Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 Arizona State Law Journal 75 (2020) (proposing changes to existing antitrust merger laws to better accommodate conglomerate mergers).

122 *See* Antitrust Guidance for Human Resource Professionals, *supra* n. 90 (analogizing wage fixing and no poach agreements to price fixing and territorial allocation agreements).

123 *JetBlue Airways Corp.*, No. CV 23-10511-WGY, 2024 WL 162876 (D. Mass. Jan. 16, 2024) at *3 (successfully challenging a merger between JetBlue Airways and Spirit Airlines because "the consumers that rely on Spirit's unique, low-price model would likely be harmed.")

124 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 11 (D.D.C. 2022) (blocking a merger between Penguin Publishing and Random House Publishing because it "would affect competition in the 'upstream' market for publishing rights," which is a labor market).

125 Marc Winerman, William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 Antitrust L.J. 295, 296 (2013).

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