LAW 2024/20
Department of Law

WORKING PAPER

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LAW Working Paper 2024/20

ISSN 1725-6739

Published in December 2024 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Abstract

Why did antitrust law in most jurisdictions adopt the consumer welfare standard (CWS)? A popular explanation, which we term the Critical Political Economy Theory of Antitrust (CPETA) pretends that the CWS reflects the triumph of conservative, anti-enforcement, and free-market ideology. The CPETA asserts that neoliberals like Robert Bork and his acolytes cajoled US courts into believing that antitrust law application required a narrow focus on economic evidence of consumer harm. By limiting the universe of injuries cognizable under antitrust law and raising plaintiffs' burden of proof, the CWS achieved the neoliberals' intended purpose: to enucleate antitrust law of any social and political relevance. This 'minimalist' version of antitrust law was subsequently globalized as part of the standard neoliberal ideological package, under the auspices of US hegemony.

The CPETA is a fable. First, the CWS is not a "plant" of Robert Bork and the Chicago School. Antitrust history shows footprints of a CWS as far back as the common law of the seventeenth century, in the first cases of the US Supreme Court, and antitrust legislation in the US and the EU decades before the ascent of neoliberalism. Second, the proposition that the CWS is slanted against antitrust enforcement cannot be reconciled with many demonstrable instances in which the CWS leads to more antitrust law intervention, not less. In fact, proponents of more antitrust enforcement in the 1980s favored the CWS over more "laissez-faire" alternatives.

What explains the success of the CWS is a more mundane, practical need for endowing real-life cases with the weight of empirical evidence. By adding an evidential filter, the CWS makes sense of an absurdly vast statute that could, on its face, condemn everything from law firm partnerships to wedding contracts. The CWS limits two types of decisional errors of antitrust laws focused on the protection of competition or the competitive process. First, the CWS reduces the type 1 error of false conviction when straight limitations of competition like collusion, monopolization, or mergers do not translate in welfare losses. Second, the CWS reduces the type 2 error of false acquittal when there is no straight evidence of a limitation of competition. Of course, the benefits of reducing type 1 and 2 errors comes with costs. Those costs relate mainly to the uncertainty of having to grapple with hard economic evidence in the face of ambiguous business conduct. These costs must be acknowledged, since one of the main welfare benefits of antitrust law lies in its predictability. But the existence of uncertainty further proves that the CWS is not a deterministic standard wedded to an anti-enforcement conservative agenda, as the CPETA suggests. If it were, non-enforcement would be assured, and no antitrust cases would be brought or won. However, this is inconsistent with the dynamics of antitrust enforcement and litigation over the past fifty years.

We conclude that CWS is a judicial interest in the truth about market competition, not a socially constructed power structure propelled by the skullduggery of a neoliberal cabal. The former explains the emergence and endurance of the CWS in US antitrust law. This view further suggests that it would have been plausible for antitrust law to orient itself towards a CWS without Robert Bork.

Keywords

antitrust, competition, law and political economy, Chicago school, consumer welfare, courts, price, output

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Do you feel what I feel, see what I see?
Hear what I hear? There is a line you must draw
Between your dream world and reality – Chuck Schudliner

Introduction

The 2010s will remain a strange period of US antitrust history. The emergence of the neobrandeisian critique shook US antitrust debate in ways that previous contestations had not. The neobrandeisian critique averred that the promotion of consumer welfare (CW) through US antitrust law denied American citizens the benefit of legislative protections against private and political power democratically granted by the Sherman Act of 1890 and in subsequent Acts of Congress. The neobrandeisians pilloried the CW standard (CWS). The CWS is a judicial construction of the language of the Sherman Act which demands a showing of restriction to price or output to condemn anticompetitive conduct.[1]

The neobrandeisian critique of the CWS is a curious case; it should have fizzled out quickly. First, the claim that US antitrust law had become too small has been a topic of scholarly discussion since the 1980s.[2] Second, attacking consumer welfare means less food on the table for American citizens, the poor, and the workers, a cause inconsistent with the progressive-leaning of the US legal academy.

Yet, despite previous iterations of the argument falling largely on deaf ears, the neobrandeisian critique of the CWS became viral in antitrust scholarship. It prompted an explosion of interest from new voices and rallied old voices that were mostly ignored in the establishment. Its main success was acted with the political appointments of neobrandeisian icons like Lina Khan at the chair of the Federal Trade Commission ("FTC") and sympathizers including Jonathan

[1] NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) ("*A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act*".").

[2] Judge Posner even declared in antitrust was dead. See Richard Posner: "The Real Corruption Is the Ownership of Congress by the Rich", PROMARKET (Mar. 28 2017) available at https://www.promarket.org/2017/03/28/richard-posner-real-corruption-ownership-congress-rich/#:~:text=Posner%20dismissed%20the%20case%20%E2%80%9Cwith,That%20was%20my%20impression.%E2%80%9D

Kanter at the Department of Justice ("DoJ"). Great hopes of making antitrust great again followed…

The neobrandeisian critique of the CWS achieved little. Most, if not all, antitrust litigation and rulemaking initiatives started under neobrandeisian leadership cling to a CWS. Even the FTC's celebrated "*noncompete rule*" that shifts the focus of the law on workers, not consumers, justifies its existence by the fact that non-competition clauses in labor contracts "*affect prices in a variety of ways*".[3]

As the neobrandeisian critique of the CWS is petering out, it is time to look back on its success, failure, and future.[4] Why did the neobrandeisian approach to criticizing antitrust capture so much attention, when previous contestations had failed? Why did its force wane at the stage of policy implementation? And are future contestations of the CWS – in another political cycle – set to fail?

This paper gives the following answers to these questions. First, the neobrandeisian critique of the CWS worked because it embraced a political story that was too good to be untrue **(I)**. Second, the neobrandeisian critique of the CWS failed because it clashed against the historical facts of antitrust law and practice **(II)**. Third, the neobrandeisian critique will fail again regardless of the political cycle because the CWS is the GOAT of all antitrust standards **(III)**.

I. The Neobrandeisian Critique of the CW is a Political Story too Good to be Untrue

Why was the neobrandeisian critique of '*small antitrust*' so influential, where others failed?[5] The answer is that the neobrandeisian critique represents what economist Robert Shiller has called an "*economic narrative*", which is a "*simple story or easily expressed explanation of events that many people want to bring up in conversation*".[6] The economic narrative of the neobrandeisian critique is that the CWS is the trojan horse of a neoliberal programme aimed at marginalizing antitrust law for the benefit of big business. We call this the critical political economic theory of

[3] Federal Trade Commission, 16 CFR Part 910, Non-Compete Clause Rule, available at https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes

[4] See Daniel Francis, *After Neo-Brandeis*, PROMARKET (Nov. 25, 2024) available at https://www.promarket.org/2024/11/25/after-neo-brandeis.

[5] For usage of the expression "small antitrust", see Nicolas Petit, *A Theory of Antitrust Limits*, 28 GEO. MASON L. REV. 1399 (2020).

[6] Robert J. Shiller, *Narrative economics*, 107 AM. ECON. REV. 967-1004 (2017) ("… or on news or social media because it can be used to stimulate the concerns or emotions of others, and/or because it appears to advance self-interest").

antitrust (CPETA). What explains the power of CPETA is that it incorporates various elements of a contagious narrative that resonated with people: provocation (1), conspiracy (2), dead people (3), hope (4), and money (5). The core facts at the heart of the CPETA, by contrast, are not all new. However, by adding the above five elements to previous antitrust narratives, the CPETA raised the stakes.[7]

1.Provocation

Until the CPETA, critics of '*small antitrust*' had been far from silent.[8] Serious arguments had challenged the "*efficiency*" orientation of the law, which allegedly excused all evils from economic concentration to consumer exploitation.[9] From the 1980s, a large body of scholarship was developed to expand the law through new theories of antitrust liability, like raising rivals' costs,[10] harm to consumer choice,[11] excessive bargaining leverage,[12] etc. In addition, a deep awareness prevailed of the ideological nature of the legal canons introduced under the reign of the Chicago school of antitrust, including the disingenuous redefinition of CW as total welfare by Robert Bork.[13] Finally, every conservative opinion of the Supreme Court (and of federal courts) in antitrust cases attracted a considerable deal of critical academic commentary.[14]

[7] CEPTA was also benefiting from a good political momentum, which it seized very well. See William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (2020).

[8] *Jonathan* B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27, 27-50 (2002).

[9] Eleanor M. Fox, *The Efficiency Paradox*, in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* 77 (Robert Pitofsky ed., 2008); Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 429-65 (1988).

[10] Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 267-71 (1983); David Scheffman & Richard S. Higgins, *Raising Rivals' Costs*, in *The Oxford Handbook of International Antitrust Economics, Volume 2* (Roger D. Blair & D. Daniel Sokol eds., 2014); Timothy J. Brennan, *Understanding "Raising Rivals' Costs"*, 33 ANTITRUST BULL. 95, 95-113 (1988).

[11] Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713 (1996); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2000).

[12] Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2004).

[13] 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 (2009); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133-64 (2011).

[14] For example, see Robert A. Skitol, *Three Years After Verizon v. Trinko: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law*, 6 ANTITRUST SOURCE (2007).

The CPETA raised the stakes by doing the unthinkable: contesting the CW goal at the heart of antitrust law. The argument was not just a call to incorporate into statutory interpretation the consideration of a multitude of economic, social, and political goals. The argument was a wholesale call to replace the consumer welfare goal, principle or standard with a broader function: checking and dispersing concentrated private power, protecting citizens at large, promoting small businesses, favoring a decentralized economy, and safeguarding democracy.

By calling the CWS "*profound nonsense*", the CPETA upended the traditional antitrust conversation.[15] Opponents of 'small antitrust' were caught by surprise by the all-out war waged at the CWS and for good reason. On its face, the CPETA critique advanced a self-defeating proposition in a country where citizens tend to choose their purses over values. Reason, skepticism, and perhaps contempt gave mainstream antitrust academics confidence that CPETA would achieve nothing. If nothing else, one fact that every antitruster could agree on in a diverse, pluralistic society was that low prices were good and high prices were bad...?

2.Conspiracy

Before the CPETA, the blame for '*small antitrust*' was all on the Chicago School. A widespread view was that in the 1970 and 80s, Robert Bork, Richard Posner, and a few others convinced the market-friendly Reagan administration and the US federal courts of the idea that "*the sole normative objective of antitrust should be to maximize consumer welfare*" and that antitrust injury "*require(d) showing harm to consumer welfare, generally in the form of price increases and output restrictions*".[16]

For the CPETA, the roots of the CW evil lie deeper. Bork and his acolytes were just minions for a broader political agenda known as neoliberalism. Commenting on the Chicago School, Lina Khan writes that the "*shrouding of market relations from politization is a signature move of neoliberalism*".[17] The articulation of a single goal CWS was thus not a consequence of legal doctrinal or economic improvement under the scholarship of lawyers and economists mostly

[15] Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. (2019).

[16] As evidenced by the (supposedly new and radical) focus of the 1982 merger guidelines on "market power, defined as the "ability of one or more firms profitably to maintain prices above competitive levels." Lina Khan, *Amazon's Antitrust Paradox*, YALE L.J. 710, 720 (2018).

[17] Lina Khan, *The Ideological Roots of America's Monopoly Problem*, 127 YALE L.J. 960, at n.40 (2018). Brian Callaci and Sandeep Vaheesan, for example, also argue that the Supreme Court's decision on vertical restraints in *Sylvania* was the product of corporate lobbying by franchisors and, more broadly, that the line of Supreme Court case law that followed after 1977 was a "*important part of the deregulatory push of the neoliberal era*." Brian Callaci and Sandeep Vaheesan, *How Antitrust Can Tame Capital and Empower Labor*, 32 NEW LAB. F. 51,54 (2024).

associated with the Chicago School. Instead, it was a conscious policy plan developed by the capitalist class when the power balance with labor shifted to its advantage in the 1970s.

By describing the close association between the neoliberal turn and the Chicago School, the CPETA presumes a "*causal pathway*" to what we have come to know as the CWS. It implies that the CWS is the product smuggled by an extremely well-organized political campaign aimed at minimizing antitrust law for the benefit of big business.[18] The argument generally denies, or outright ignores, the possibility that the CWS was, or that it could be, the result of a natural evolution of antitrust law. It also overestimates the methodological soundness of critical political economy.

3.Dead people

Antitrust scholarship has always been a conversation about doctrine and economic ideas however, things changed with the neobrandeisian literature. Those well versed in the genre will have noted increased mentions of historical figures.

The CPETA has one villain: Robert Bork, conservative scholar, author of the "*Antitrust Paradox*", failed candidate for the Supreme Court nominated by President Reagan. And it has a hero: Louis D. Brandeis, progressive scholar, public interest lawyer, and Supreme Court justice appointed by President Wilson.

The CPETA gallery showcases more pictures of antitrust personalities: Aaron Director, founder of the Chicago School of antitrust, a "*Socrates-like figure who left behind many books*";[19] Richard Posner, father of the law and economics movement; Henry Manne, convenor of law and economics seminars for federal judges; and George Stigler, Nobel Prize economist, laissez-faire adept but also theorist of regulatory capture.

The density of reference to individual characters is suggestive of the narrative-building ambition of the CPETA. Nothing drives a story better than good characters, especially when the protagonists are dead. Moreover, the normative orientation of CPETA is also discernible in certain conspicuous absences of the Antitrust Hall of Fame. Where are the famous advocates of strong but welfare-centric antitrust enforcement like Thurman Arnold, Donald Turner, or Philip Areeda?

[18] Sungjoon Cho, *The Evolving Geography of the American Antitrust Mind*, *Va. L. & Bus. Rev*. 17, 281 (2022).

[19] Tim Wu, The Curse of Bigness, 84 (2018).

4.Hope

Under the CWS, antitrust reform is slow.[20] Influenced by the common law process, US courts adjust antitrust doctrine considering changes in factual circumstances and economic knowledge. There is no ratchet.[21] The courts occasionally develop doctrine to exonerate previously unlawful types and business conduct or transactions (like efforts by manufacturers to set resale prices).[22] But they also declare what had never been illegal (like efforts by primary goods suppliers to lock in customers in secondary markets) illegal.[23] Modifications of antitrust doctrine are incremental, focused, and technical.

The CPETA makes more radical promises. For instance, they believe that the gamut of doctrinal shackles that keep *antitrust* small can be dismantled overnight. CPETA considers the CW paradigm to be the result of a political power structure. If this is the case, there is no reason why it cannot be directly replaced by political fiat. The neobrandeisians aim to tip the balance of political power in their favor (currently partial to capital), and to remove from the law all the antitrust 'sword' and 'shields' that protect the institutions that neoliberalism favors.

Unsurprisingly, the CPETA views Congress and the press as its preferred channel of advocacy for antitrust reform; the courts, by contrast, are a dead end. Similarly, much of the discourse used by CPETA to support its claims consists of claiming that the Chicago School transformed US antitrust law in ways which ignore congressional intent and the purpose and views of the drafters of the Sherman Act.[24]

5.Money

CPETA made the Chicago School story bigger by adding one last ingredient: money. The issue shines through in multiple places. First, Judge Bork and the Chicago School were the harbingers of a neoliberal programme carried out primarily for the financial interest of big business. CPETA gives no credit nor any consideration to an alternative hypothesis. Namely, Chicagoans' support of big business was coincidental, not causal, and was the outcome of

[20] Often, it lags behind progress in economic knowledge. See Steven C. Salop, *Exclusionary vertical restraints law: Has economics mattered?* 83 AM. ECON. REV. 168-72 (1993).

[21] Frank H. Easterbook, *Is there a ratchet in antitrust law*, 60 TEX. L. REV. 705 (1981).

[22] *Leegin Creative Leather Products*, *Inc* v PSKS, Inc [2007] 551 US 877.

[23] *Eastman Kodak Co v Image Technical Services*, Inc et al [1992] 504 US 451.

[24] Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE, 131. (Claiming that the Chicago School's ideas set US antitrust law on a "radically new course.").

solid theoretical and empirical research. This research invalidated the correlations between structure, conduct and performance established in the 1950s by Joe Bain and the Harvard School.[25]

Second, CPETA considers that economic concentration exerts a corrupting force on democracy. One particular channel of influence of big business on democracy consists in buying experts.[26] CPETA insinuates that a large flow of money in antitrust litigation distorts the academic dialogue and reshapes expertise into advocacy, especially in the economics profession, where expert witnesses are needed in almost every case.

6.Transformative Power of CPETA

In one swift move, the neobrandeisian movement transformed the known story of the Chicago School revolution into a critical political economy theory of antitrust. All the major themes and tropes of a critical political economy theory of antitrust are present in the neobrandeisian critique: economization (in the form of the CWS), "*depolitization*" of antitrust law through "*technocratic*" legal and economic arguments (masking deep-seated political preferences, such as laissez-faire); the role of an "*elite*" in first imposing, then disseminating neoliberal rationalities (Aaron Director, Robert Bork, Richard Posner, Henry Manne, etc); and a Marxian vision of class struggle in which capital and labor vie for power in a zero-sum game. Ironically, the CWS represents the victory of capital over labor because it guts enforcement, whereas in the other, it represents the victory of capital precisely because it bolsters it.[27]

That transformation, together with other contextual and tactical factors, explains why a movement directed toward consumer welfare captured so much of the audience in the academy, the press, and beyond.

[25] A review of these works, including a full set of references, appears at pp 1697-1698, in Frank H. Easterbrook, *Workable Antitrust Policy,* 84 MICH. L. REV. 1696, 1696-1713 (1986).

[26] Jonathan Kanter, Remarks for the Fordham Competition Law Institute's 51st Annual Conferenceon International Antitrust Law and Policy, September 12, 2024, available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law-0

[27] See HUBERT BUCH-HANSEN & ANGELA WIGGER, THE POLITICS OF EUROPEAN COMPETITION REGULATION: A CRITICAL POLITICAL ECONOMY PERSPECTIVE (2011). (Arguing that the neoliberaliation of European competition law has led both to aggressive antitrust enforcement and an exclusive focus on consumers).

II. The Neobrandeisian Critique failed because its Understanding of Antitrust did not align with the History and Trajectory of Practices in the Field

The neobrandeisian critique of the CWS was short-lived, and its force was mostly seen in incentivizing a strong rhetoric against economics in legal scholarship as well as in political appointments at the leadership of US antitrust agencies. Beyond this, it has so far achieved little in real-life antitrust cases. Perhaps the main achievement is the start of antitrust litigation against each of the large tech platforms. It is, however, too early to determine if the neobrandeisian critique will attain success or failure in these cases. Interestingly, upon closer examination, all, if not most, of these cases were brought under a CWS standard, and we need to determine why this would be the case.

One hypothesis is that the neobrandeisian bias against the CWS embodied limited engagement with the hard facts of antitrust practice. On close examination, the law's requirement of a showing of consumer harm through increased price, reduced output, or some other metric of harm did not really hinder antitrust action. On the ground, the CWS' public enemy number 1 that marginalized antitrust enforcement turned out to be a neutral standard, supportive of both pro and anti-enforcement platforms.

The reason for this late realization is what interests us. What did the initial neobrandeisian story about the CWS fail to appreciate? In our view, the neobrandeisians may have misinterpreted some historical aspects of antitrust . CPETA approached the CWS as the political ploy of a neoliberal cabal when it was, in fact, the result of the natural evolution of antitrust law **(1)**, and CPETA underestimated the capacity of the CWS to support a pro-enforcement antitrust program **(2)**.

1.Historical Presentism

CPETA views CWS-oriented antitrust law as a meteor falling from the sky in the 1970s. The Chicago School concocted it in a bid to derail antitrust law from its original progressive goals. Tim Wu, for example, writes in "*The Curse of Bigness*" that Aaron Director criticized US antitrust law on what he thought the law should be, not what it was, suggesting that the CWS was external to US antitrust law — a foreign body. Aaron Director, Wu writes, was like the "*scientist who faults Star Wars for failing to explain hyperspace*."[28]

[28] Wu, *supra* n.19, at 86. Wu is right in one thing: the CWS made a statute that was dispersed and indeterminate more scientific, thus turning what could be compared to sci-fi into something more akin to science. Khan and Teachout similarly contend that, in a "*sea change*" that took place in the 1970s, the CWS came to supplant the real goals of antitrust law: the protection of small enterprises and a achieving decentralized economy. Lina Khan and

One historical truth that the neobrandeisian critique gets right is that the Chicago School transformed antitrust law. By contrast, the CPETA overstates antitrust history in its description of a radical transformation under the Chicago School. The transformation was an incremental improvement, not a *coup*. The neobrandeisian literature falls prey to 'presentism' – focus on one event, here the Chicago school, through a modern lens – and misses that US jurisprudence embodied CWS substance well before the neoliberals.

At the dawn of the 20th century, in the progressive era, US courts had already started to read the Sherman Act as a Congressional demand to safeguard the supreme good of economic competition. In interpreting this act, the justices asked themselves questions about consumer welfare.[29] As early as 1904, the Supreme Court's opinion in *Northern Securities* stated that the Sherman Act addresses an "*economic question*," that is, how to optimize "*public convenience*" and "*general welfare*.[30]

Subsequently, concerns about consumers and prices typical of the CWS were quick to emerge, at least nominally, in the Supreme Court's case law. Decisions like *Central Lumber v South Dakota* in 1912,[31] *Chicago Board of Trade* in 1918,[32] or *US Steel* in 1920[33] talked of "*consumers interest*," "*power over price,*" and "*raising prices to consumers.*".

Beyond these linguistic traces, several opinions developed Sherman Act doctrine in the consumer welfare direction. In the 1911 *American Tobacco* decision, the Supreme Court used consumer welfare reasoning to define monopolies.[34] It held that "*The essential idea of monopoly is ability to control prices or to deprive the public of advantages flowing from free*

Zephyr Teachout, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 66 (2014). In another article, Khan claims that the Chicago School "upended" the traditional approach to antitrust law by focusing on CW. Khan, *supra* n.16, at 742; Khan, *supra* n. 24, at 132. Elsewhere, a CWS-oriented US antitrust law is cast as a "counter-revolution" that "rewrote antitrust." Lina Khan and Sandeep Vaheesan, Market Power and Inequality: *The Antirust Counter-Revolution and its Discontents*, 11 Harv. L. & Pol'y Rev. 235, 236-7 (2017).

[29] Robert Pitofsky, *The political content of antitrust,* COMPETITION LAW 155-185 (2017).

[30] *Northern Securities Co. v. United States*, 193 U.S. 197, 199 (1904).

[31] *Central Lumber Co v. South Dakota,* 226 U.S. 157 (1912).

[32] *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

[33] *United States v. United States Steel Corp.,* 251 U.S. 417 (1920).

[34] *United States v. American Tobacco Co*., 221 U.S. 106 (1911).

competition."[35] Further spelling out vintage consumer welfare reasoning, the Court characterized restricting output and raising prices as causing "*infinite injury upon the public*."[36]

Even more spectacularly, Justice Brandeis himself inked out CWS logic in the 1918 *Chicago Board of Trade*. The opinion is often discussed for its overinclusive formulation of the rule of reason. However, this misses the holding whereby a joint country dealer scheme of higher payments to farmers only escapes Section 1 liability conditional on the absence of any price increase to consumers. If anything, today, this often-ignored side of Justice Brandeis would make him look like an ultra-CWS activist.

Even more surprising, a study of progressive-era antitrust cases reveals embryonic forms of the CWS in common law.[37] Here is a synthetic overview of some key findings, with emphasis on the CWS evidence:

- In 1895, in his dissent in E.C. *Knight Company*,[38] Justice Harlan quotes a common law case on restraints of trade, *Central Ohio Salt Co. v. Guthrie*, which states that "*Public policy unquestionably favors competition in trade to the end that its commodities may be afforded to* consumers as cheaply as possible*, and is opposed to monopolies which tend to advance market prices, to the injury of the general public…* (emphasis added)".[39]

- The Sixth Circuit's *Addyston Pipe* decision in 1899, for example, authored by future President and Supreme Court Justice William Howard Taft, sparingly cited *Michel v. Reynolds* – a common law case concerned with the question of the unreasonableness of restraints on trade – to support the finding that a contract is reasonable when it is ancillary to and necessary for achieving a

[35] *Id*, 118.

[36] *Id*., 187.

[37] As is well known, US antitrust law is a common law. The Supreme Court held in *Nat'l Society of Professional Engineers* that "The legislative history [of the Sherman Act] makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition." *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 688 (1978).

[38] *United States v. E. C. Knight Co.,* 156 U.S. 1, 27 (1895).

[39] *Id*. Quoting Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672 (1880). Note that the "interest of the public" here is clearly associated with low prices, which is where the restraint of trade falls foul of the law — and why it incurs condemnation.

larger, legitimate purpose such as facilitating a transfer of property.[40] By contrast, the Sixth Circuit held that a contract was unreasonable where the sole object of both parties was merely to restrain competition and "*enhance and maintain prices*."[41]

- In its 1911 *Standard Oil* decision, the Supreme Court explained that the purpose of the prohibition of unreasonable restraints of trade under the common law was to protect the interest of the commonwealth.[42] The "*interest of the commonwealth*", in this case, mandated preventing unreasonable restraints on trade, limits on the rights of individuals, restraints on the free flow of commerce, or "*public evils such as the enhancement of prices*."[43] Thus, the evolved common law justification for not enforcing unreasonable restraints of trade was, from the beginning, intrinsically linked to the ensuing effect on prices. There is even a passage in *Standard Oil* which, in defining the evils of monopoly and the purpose of the Sherman Act, outlined the contours of the CWS with remarkable lucidity: "*The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale*".[44]

This is not all. The vestiges of the CWS are even older.[45.]

[40] 85 F. 271, 280 (6th Cir. 1898) (explaining the common law against unreasonable restraints of trade, and citing Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26).

[41] *Id*., 272.

[42] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 54 (1911).

[43] *Id*., 221.

[44] *Id*., 221 U.S.52.

[45] The definition of monopoly from *Standard Oil* cited above is given to us through a citation of Hawkins' *Treatise of the Pleas of the Crown*, in which Hawkins was attempting to clarify the the common law understanding of government-granted monopoly, the evils associated with it, and the difference between monopoly and engrossing. *See* William Hawkins, *A Treatise of the Pleas of the Crown — Book I*, Chapter 29 (1716). Three are thus the harms inflicted by a monopoly, according to the traditional understaning of English common law: (i) incresaed prices; (ii) decreased output and (iii) decreased quality. See *Id.* 53 (stating that the principal wrong which which it was deemed would result from monopoly in the English common law was the enhancement of price), 57 (connecting diminished competition and thus monopolization with enhanced prices), 58 (stating that what led to the prohibition of

- Three hundred years before, in 1610, King James VI and I's *Book of Bounty* declared monopolies contrary to the laws but dispensed those that were not "mischievous to the state, *by raising prices of commodities* at home, or hurt of trade, or [were] otherwise inconvenient"[46] (emphasis added). The same language carried over, verbatim, to the 1624 *Statute of Monopolies*[47] which, as some authors have pointed out, was much more concerned with controlling the spread of monopolies than with granting patents to foster innovation.[48]

- In the famous 1612 *Darcy v. Allen* case, Lord Coke provided an explanation for the decision of the King's Bench to void a grant for the exclusive monopoly for the *manufacture*, importation and trade in playing cards in England. According to Coke,[49] there are "three inseparable incidents to every monopoly against the commonwealth" which render them illegitimate: they raised prices, reduced quality, and impoverish those displaced from their trade.[50] Coke, Hawkins, and the English common law were later cited in US Supreme Court cases, such as *Standard Oil*, in explaining the evils of monopoly and the bounty of competition.[51]

unreasonable restraints of trade in English common law was the upwards effect of such covenants on prices, and that this was against public policy). See also Matthew Fisher, *The Statute of Monopolies and Modern Patent Law: Foundation or Elaborate Folly?* INTELL. PROP. Q. 176 (2022). This interpretation is not at all exclusive to Hawkins (to the contrary, Hawkins was mostly reproducing Lord Coke).

[46] *A Declaration of His Maiesties' Royall pleasure, in whatsort He thinketh fit to enlarge or reserve Himself in matter of Bountie* (Robert Barker, 1610).

[47] *An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof*, 1623, 21 Jac. I, c.3.

[48] Fisher, *supra* n. 45, at 3. ("The Statute itself, far from being enacted to foster innovation, was actually designed to deal with the problems created by other, less beneficial, forms of innovative practice: the Crown's profligate use of prerogative powers to grant so-called "odious" monopolies. These bad monopolies were essentially cheap rewards issued by an impoverished Monarch,15 which handed control of existing trades to Crown favourites and other hangers-on. The existence of these grants, and the regulatory powers that went with them, l*ed to grave abuse; raised prices, reduced quality and limited supply*" (emphasis added).

[49] *The Case of Monopolies* 11 Co Rep 84b.

[50] Fisher, *supra* n. 45, at 17.

[51] See, e.g., *Standard Oil*, *supra*, n. 45. 45. See also *Nat'l Society of Professional Engineers*, 688. ("The legislative history [of the Sherman Act] makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition"); *Knight Co*., 9 (quoting Lord Coke's definition of monopoly). For the link between US antitrust law and the common law, see e.g., William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U.CHI. LAW. REV. 355, 373, 384 (1954).

This is not to say that the CWS was clearly articulated in US antitrust law from day one. The bottom line is that much of the CWS substance existed in US jurisprudence decades before the neoliberal turn, as well as in English caselaw decades before the Declaration of Independence! While it is true that antitrust law became more focused on CW in the 1970s and 1980s, it did not immediately adopt CWS with the turn of neoliberalism. Instead, antitrust law moved, slowly but surely — though with considerable zig-zagging — towards a CWS. Antitrust law was at times still confused, "*at war with itself*" as Bork stated.[52] Some cases, which emphasized atomistic competition, economic freedom, small businesses, and prices, were contradictory and invoked goals that were seemingly incompatible, such as the need to prevent companies from "*crushing of competitors*". For example, *Trans-Missouri* – one of the first antitrust decisions of the Court – embodied consumer welfare rhetoric but also held that "*corporate aggrandizement*" could reduce prices, and thus eliminate the class of "*small dealers and worthy men*".[53]

Subsequent cases from the 1950s to 1970s feature similar equivoque. In *Dupont*, a 1956 decision famous for the "*cellophane fallacy,*" the Court found that litigation under the Sherman Act was directed "*against enhancement of price or throttling of competition*".[54] Yet, six years later, in *Brown Shoe*, the Court condemned the merger of a shoe producer and retailer with minuscule market shares on the ground that the combination reduces the number of companies on the market. While consumer prices were irrelevant to the Court's concerns, the disappearance of the "*small independent merchant in the face of competition from vertically integrated giants*" was.[55] *Topco*, in 1972, is even more confusing. The Court held that any restraint that limited parties' freedom through market division was *per se* illegal, even if it enhanced competition amongst small retailers and reduces consumer prices.[56]

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

[53] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 322, 323 (1897). Also, "*mere reduction in the price of a commodity*" would be paid for dearly. *Id*., 323,

[54] *United States v. E. I. du Pont de Nemours & Co*., 351 U.S. 377, 387 (1956).

[55] *Brown Shoe Co. v. United States,* 370 U. S. 294, 370 U. S. 333, 370 U. S. 346.

[56] *United States v. Topco Assocs., Inc*., 405 U.S. 596, 610 (1972) ("The District Court determined that, by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy.").

This notwithstanding, a thorough historical account shows that CPETA was built on rickety doctrinal foundations as CPETA overstated the Chicago School's usage of CW. Granted, the Chicago School rationalized the growing cacophony of contradictory ideas that grew out of antitrust application against the backdrop of a statute drafted in "*sweeping language*". However, it is wrong to contend that the Chicago School fabricated the idea that competition and the antitrust laws were the institutions of choice to fight price increases and output reductions. Consumer welfare was a long apolitical concern whose fibers ran throughout jurisprudential history.

2.Erroneous beliefs about Antitrust Law in Practice

CPETA's second mistake was to believe the CWS was biased against enforcement. That understanding came out of the combination of two ideas: the CWS **(a)** directs antitrust law application at price-centric cases that are difficult to prove (price centricity), and **(b)** diverts antitrust law application away from non-price parameters (nonprice cecity).

a) Price centricity

Cases can be won under a price-centric CWS. Below, we point to a few selected cases that undermine the claim that there exists a trade-off between price centricity and enforcement.[57] We focus on the period 1980-2000, generally described as the comatose of antitrust enforcement.

- Section 1
    - *Nati'l Society of Professional Engineers*, of 1978, found suppression of price competition between professional engineers — who agreed not to discuss prices with potential clients — unlawful under the rule of reason. As the court noted, "*no elaborate industry analysis [was] necessary to demonstrate the anticompetitive character of such an agreement"*.[58] It is hard to see how this principle helps or how it perpetuates an anti-enforcement bias.
    - *Catalano*, of 1980, clarified that price increases could also be affected through means of discount reductions previously granted. The impugned conduct fell under the *per se* prohibition in Section 1. The Court held the procompetitive

[57] We do not go beyond 2000 because 30 years of non-price centricity under the supposed neoliberal paradigm are probably enough.

[58] *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978).

justifications advanced implausible.[59] Interestingly, the court gave more weight to a short-term indirect price increase than potential long-term decreases in the invoice price, a typical pro-enforcement attitude.[60]

- *Palmer v. BRG of Georgia, of 1990, condemned a territorial allocation agreement* between companies that resulted in a demonstrable price increase. Under the infringement, the prices of BRG's Georgia bar review courses went up from $150 to $400. Even though the parties had not explicitly agreed to fix prices (pursuant to the agreement, rival HBJ was to receive a cut of the supra competitive profits), the restraint of competition and the ensuing — obvious — increase in prices was enough to condemn the agreement under the *per se* rule.[61]

- *FTC v. Indiana Fed'n Dentists*, of 1996, finds a trade association guilty of a Section 1 violation through enlisting member dentists to pledge not to submit x-rays to insurers in conjunction with claim forms. The case features no clear evidence of price harm on consumers, but this is not fatal. The Court is satisfied with actual evidence in the case that practice lowered output, in the sense that dentists had refused to send to insurers the x rays necessary to evaluate coverage of requested treatments.[62]

- Section 2

  - *Otter Tail*, of 1973,[63] found a dominant supplier of energy guilty of unlawful monopolization. The defendant had employed a variety of (non-price) tactics to dissuade client municipalities from vertically integrating into the energy supply at the end of their contracts. This "little splendid victory" was reached without

[59] *Catalano, Inc. v. Target Sales, Inc*., 446 U.S. 643, 648, (1980).

[60] *Id*., 649.

[61] *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990).

[62] *FTC v.* Indiana *Fed'n of Dentists*, 476 U.S. 447, 459 (1986). See also 459. ("Application of the rule of reason to these facts is not a matter of any great difficulty"). Nor was the conclusion precluded by the FTC's failure to show that the restraint had resulted in more costly dental services to patients. *Id*., 447-8. The corut also points out that the FTC was right to rely on "common sense and economic theory. *Id*., 456.

[63] *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973).

the Court entering into any kind of price analysis.[64] The case was, however, well within the price-centric CW paradigm. To dismiss the defence of the dominant firm, the Court recalled that the Sherman Act "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency".

- *Kodak*, of 1991, found that a producer of photocopiers and micrographic equipment both enjoyed and had "exerted" monopoly power in the aftermarkets for parts and services "where locked in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long term loss" for the producer due to lack of substitution in the primary market.[65] Kodak saw the Supreme Court relied on the economics of customer lock-in to reject the neoclassical price theory assumption that firms cannot charge supra-competitive prices in secondary good markets absent market power in the primary good market. The evidence on the record showed that Kodak's service was of higher price and lower quality than rival services and that Kodak's price discriminated against customers willing to switch.

- In *re Intel Corp* (1999), the FTC brought an antitrust lawsuit against Intel Corporation.[66] The FTC alleged that Intel used its monopoly position in the market for microprocessors to prevent other firms from enforcing their patents.[67] The case gave rise to a settlement. Intel agreed to a settlement of their dispute on March 8, 1999. The FTC obtained a commitment that Intel would not withhold technical information and samples from innovating customers suing it for patent infringement unless the latter would seek an injunction against Intel's manufacture and sale of its microprocessors. The settlement was all about limiting and safeguarding the innovation harms that had arisen from Intel's hardball negotiation tactics.

Findings of liability or consent decrees were consistently reached in price-centric cases (price fixing and price increasing) following the supposed neoliberal turn. If something decreased

[64] Donald I. Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV 898 (1986).

[65] *Eastman Kodak Co v Image Technical Services, Inc et al* [1992] 504 US 451.

[66] *Intel Corp 128 F.T.C. 213.*

[67] *Id.*

enforcement levels, it must be something other than the cancelling impact of the CWS. Interestingly, the discussion of the above cases is generally avoided in neobrandeisian literature. Their omission may owe to the fact that (i) these cases do not individually hold the qualitative properties of a 'good' antitrust case by neobrandeisian standards, or (ii) they do not collectively add up to create the quantitative level of judicial activity that neobrandeisians would deem appropriate. If this is the case, however, everyone would benefit if the neobrandeisians could specify what they consider the feature of a good antitrust case or the optimal level of enforcement. In short, how many cases should be brought and what kind of cases should be won?

b) Nonprice cecity

CPETA claims that the CWS fails on its own terms because it edentates antitrust enforcement against non-price harms from business conduct or transactions.[126] This, however, has nothing to do with the CWS but with the simple fact that, from a practical standpoint, it is much easier to demonstrate actual or potential price fluctuations than changes in more subjective concepts like quality and innovation. This is why pure innovation cases (but also procompetitive defences) have been rare under US antitrust law. Like all decision-makers, antitrust agencies and courts are constrained in their ability to discover facts that are imperfectly observable (e.g., successful entry deterrence), measurable (e.g., product quality) or predictable (e.g., innovation and technological progress). Some data are easier to obtain, and some facts are easier to establish. So antitrust enforcers may have, for reason of prudence or pragmatism, focused on price and output effects.

That being said, antitrust agencies and courts do examine non-price effects, mindful of competitive injury or loss and cases decided after the supposed neoliberal takeover of the CWS show this. In *U.S. v. Microsoft Corporation*, the District Court for the Ninth Circuit condemned practices unrelated to price that threatened to raise entry barriers and thus reduce or delay innovation.[68] The court added that "*judicial deference to product innovation… does not mean that a monopolist's product design decisions are per se lawful*".[69] This implies that while innovation is relevant under antitrust law, it is not a "get out of jail free card" for monopolists. Tim Wu called this judgment the "*last big antitrust case*."[70] However, this case was brought —

[68] *U.S. v. Microsoft Corporation,* Docket Nos. 00-5212, 00-5213 (2000).

[69] Id., 37.

[70] Wu, *supra*, n.19, at 93-100.

and won — under a CWS. The US Court of Appeals for the District of Columbia Circuit explicitly linked competitive markets with innovation.[71]

Previously, in 1983, in *Foremost Pro Color*, the same court had found that "*product innovation, particularly in such technologically advancing industries as the photographic industry, is in many cases the essence of competitive conduct*."[72] It added that "*the process of invention and innovation is necessarily tolerated by the antitrust laws" (internal citations omitted) and forms an essential component of "competition on the merits"*."[73]

Besides innovation, consumer choice, not just prices, was also central to findings of liability. *Nati'l Society of Professional Engineers* and *FTC v. Indiana Fed'n Dentists* both sanctioned reductions in consumer choice. As pointed out above, the latter case has a clear connection to what can unambiguously be called a CWS framework. At stake was consumers' ability to choose dental services based on information that was being unduly withheld by the Federation. This circumvented the workings of the free market by restricting consumers' choice and *ability* to choose. No showing of price was deemed necessary in the case, and although the FTC showed a reduction in output, the question of choice was central. As the court noted, the impugned agreements limited consumer choice, hence impeding the "*ordinary give-and-take of the marketplace*."[74]

Output has also occasionally been a basis for antitrust liability. *NCAA v. Board of Regents* of 1984 gives a good illustration. The case featured an attempt by the NCAA to limit a College Football Association's freedom to sell rights for televised games. The NCAA was seeking to protect the revenue stream generated by live attendance of football games. To reach a finding of liability under Section 1, the Court focused on output, not price. The opinion held that the restraint "*limit[ed] the total amount of televised intercollegiate football and the number of games that any one team may televise*".[75] The Court expressly lamented that "*production has been limited, not enhanced*".[76]

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[71] *Microsoft*., 49.

[72] *Foremost Pro Color, Inc. v. Eastman Kodak Co*., 703 F.2d 534, (9th Cir. 1983)

[73] *Id*.

[74] *FTC v. Indiana Fed'n Dentists, 459;* National Society of Professional Engineers, 435.

[75] *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 94 (1984)

[76] *Id.,* 114.

3.Interim Conclusion

The weak enforcement muscle of the CWS exists mostly in the figments of neobrandeisians' imagination. History and practice suggest that the causal chain between the CWS and '*small antitrust*' is not backed by facts. The CWS is inherently capable of supporting a pro-enforcement antitrust program.

To give credit to CPETA, we may want to accept the possibility that the claim of the neobrandeisians is actually not that the CW makes antitrust toothless but instead that it makes antitrust smaller than it could (desirably) be. But the ball then ought to be in the neobrandeisian camp to formulate how big it should be. This will be a difficult case to make simultanously with the contention that big is bad.

III. The Enduring Success of the CWS is due to its Superiority in Highly Judicialized Systems of Antitrust Law

If not a CPETA, what explains the success of the CWS? The diffusion of the CWS in US antitrust law stems from its superiority over other standards in setting necessary limits to judicial discretion **(1)**. An objection to the superiority hypothesis is that the CWS introduces new areas of judicial discretion in antitrust cases.[77] On close examination, the critique falls flat **(2)**.

1.The CWS dominates other Antitrust standards the Competition against Discretion

a.The Anxious Mind of the Antitrust Judge

Judges, including antitrust judges, dislike discretion. Any judge asked to apply the Sherman Act walks on a discretion tightrope without a safety net. There are four important considerations we shall examine here.

First, the Sherman Act uses "*sweeping language*".[78] The statutory text can be read in absurdly narrow or vast ways. In the infamous *US v Knight* case of 1985, the Supreme Court considered that the statutory reference to "*commerce*" justified removing manufacture, agriculture, mining and production from the ambit of the Sherman Act.[79] Conversely, in *Anderson*, the Court

[77] That, in itself, could be evidence for the PET, ie through a framing of judicial discretion.

78 324 F.3d 141 (3d Cir. 2003) (en banc).

[79] 156 U.S. 1 (1895). In 1920, the Court repeated the same mistake in *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.* holding that advertisement was not commerce because it was an "*incident*" to commercial intercourse. See 252 U.S. 436 (1920).

observed, "*there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void*".[80] Nothing in text law really precludes the Sherman Act from reaching cartels of state-owned oil companies to law firm partnerships

Second, the facts involved in (most) antitrust cases are murky. The cases of neat price-fixing cartels, total monopolization or merger to monopoly exist only in textbooks.[81] In real life, few cases feature the "*supreme evils*" of antitrust.[82] Cases arise from disagreements about the equivocal competitive purpose or effect of commonplace or novel business practices. To know whether business conduct falls within the forbidden categories, courts resort to additional inquiries. The facts are difficult to observe and even harder to interpret. The antitrust statute leaves courts without guidance over the depth and direction of the needed discovery of facts.

Third, generalist courts enforce US antitrust law. The Sherman Act asks lay judges and juries without economics training or professional expertise to "*answer legal questions about business conduct*".[83] With this, it should be obvious that even courts with antitrust experience will approach the facts of the particular case with low confidence levels.

Fourth, antitrust entails the adoption of significant remedies like damages and cease and desist, and equitable remedies, including injunctions, orders, disgorgement of wrongful gains, supervision by monitoring trustees and dissolution of a company. Granted, other areas of the law offer equally strong remedies, including economic regulation, fiduciary law, and taxation. However, applying antitrust law is like asking a layperson to fly a packed commercial jetliner over New York City. No sensible person would want to take such a responsibility without prior training and the guidance of the onboard safety systems and the autopilot. The same is true of antitrust judges. Much like how the onboard safety systems built into modern-day aircraft prevent pilots from flying aircraft dangerously, Judges want limits to the discretion embedded in the law.

[80] *Anderson v. United States*, 171 U.S. 604, 616 (1898).

[81] The problem is not legal or conceptual. It is practical. In real life, business conduct that brazenly violates antitrust law is concealed, meaning courts are constrained in their ability to discover the facts.

[82] *Verizon Commc'ns., Inc. v. Law Offs. of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004).

[83] Joe Sims & Robert H. Lande, *The End of Antitrust-Or a New Beginning*, 31 ANTITRUST BULL 301 (Summer 1986).

b.The Circularity of Alternative Standards

Setting limits to antitrust discretion required adding a "*standard*" to statutory text. A standard specifies the content of the law.[84] As we saw, the US courts repeatedly selected the CWS as their preferred standard, but why did they cling to the CWS when novel standards were advanced in law and policy debates?

The answer is that alternative standards pull antitrust back on the discretion tightrope by reaffirming the judicial discretion inherent in statutory law. A "*protection of competition*" standard will be violated as soon as the market power acts of collusion, monopolization, or structural consolidation defined in statutory law are reported to an antitrust court. The "*protection of the competitive process*" is similarly redundant. All acts of bad conduct spelled out in antitrust statute epitomize "*distortions of the competitive process*". Collusion removes independence from competitors and monopolization eliminates rivalry. Both standards add nothing to text law and are thus circular,[85] with Herbert Hovenkamp calling them "*slogans*".[86] By contrast, the CWS further specifies the law because it considers that antitrust violations require more than a showing of harm to "*a process of independence or rivalry*", i.e. an additional inquiry in the "*outcome of a process*".[87]

To be clear, the "*protection of competition*" or of the "*competitive process*" standards could limit discretion if they added operational criteria of social choice that would allow sorting between good and bad reductions of rivalry or independence. Tim Wu, who advocates a replacement of the CWS by both standards, says there is "*much further work and practice to arrive at practicable standards*".

Fortunately, work has been done to replace both standards. Firstly, antitrust courts have historically sought to limit their discretion by juxtaposing epithets to the protection of competition or the competitive process. A litany of opinions talks of the protection of "*fair*" competition, of

[84] I. Ehrlich, R. A. Posner, "An economic analysis of legal rulemaking." 3(1) The Journal of Legal Studies (1974) 257-286. V. Fon, F. Parisi, "On the optimal specificity of legal rules." 3(2) Journal of Institutional Economics (2007) 147-164. A legal rule does the same, with a higher degree of precision, and does it ex ante. The rich law and economics discussion over rules and standards is not relevant for the purposes of the above discussion.

[85] They mean reversion to text law, and in turn discretion.

[86] Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 NYUJ LEGIS. & PUB. POL'Y 705 (2022).

[87] Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, SUP. CT. REV 319-349 (1982).

competition on the "*merits*", or "*free"* competition. With these, antitrust courts added "*rhetoric*" to the law, nothing else.[88] Take, for example, the fair competition epithet and ask yourself the question: should antitrust law protect Uber from exclusion by local cab drivers? A "*fair*" competition standard does not settle anything, so let's look at the issue concretely. Between Uber and the incumbent cab companies, whose conduct could be seen as the fairest? Is Uber projecting fair competition on incumbents when this is financed through salaries barely giving drivers a living wage? Or are incumbents who seek protection by lobbying for regulatory privileges engaging in fair competition?

Second, antitrust courts have attempted to constrain their discretion by developing what Daniel Francis has aptly called "*mini rules*".[89] Some mini rules are substantive like the Areeda Turner (price cost) test for predatory pricing under Section 2. Other mini rules are more analytical, such as the different versions of the rule of reason applied under Section 1. One example is the quasi *per se* rule for tying arrangements.[90]

With exceptions, efforts to cabin judicial discretion through mini rules shift discretion more than reduce it. If it is the "*character of the restraint*" that determines the applicable mini rule, then form matters a great deal.[91] Given that few restraints present themselves with a label on them, courts asked to apply competing mini rules and spend a long time stuck on the tightrope of discretion. For example, when several competing banana producers in a market hold restricted discussions on the weather forecast, is this information sharing, price fixing, or group boycott? Similarly, any tying case can be repackaged as a refusal to deal in the tying product on a stand-alone basis.

The mini rules mess explains antitrust scholarship fixation on unifying standards.[92] Over the past decades, every search ended back at the CWS square. There is a test that goes beyond a concern for the competitive process by incorporating consideration of the material welfare consequences of business conduct or transactions. The predatory pricing mini rule is the best example. In *Brooke Group*, the Court added a consumer harm filter in predatory pricing cases.[93]

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[88] Rudolph J. Periz, *A counter-history of antitrust law*, DUKE LJ 263 (1990).

[89] Danie Francis, *Comments on the 2023 Draft Merger Guidelines*, *Available at SSRN* (2023).

[90] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).

[91] *Id*.

[92] Einer Elhauge, *Defining better monopolization standards*, 56 STAN. L. REV. 253 (2003).

[93] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 232 (1993).

Unless a plaintiff shows that the prey has a "*reasonable prospect*" of recouping its investment into low consumer prices, prices below costs benefit consumers and are thus presumably lawful.

In fact, even modern proponents of CWS alternatives that want to shift the analysis towards the "*dynamics of the competitive process*" end up incorporating elements of the CWS. In his proposed framework of analysis, Tim Wu, for example, refers to "*raising of rivals' costs*" and "*anticompetitive effects*" – all terms of art that are central to antitrust law in the CW paradigm.[94]

c.The Error Correction Filter of the CWS

The CWS narrows the risk of discretionary antitrust standards like the protection of competition or the competitive process. First, the CWS reduces the type 1 error of false conviction in regard to industries or practices where straight reductions in competition (like collusion, monopolization, or mergers) do not translate into social welfare losses. Examples include exclusionary behavior in digital markets with large network effects or in capital-intensive industries like telecoms, pharmaceuticals or defence, and distribution agreements where restrictions on intrabrand competition protect retailers against free-riding and promote investment or employment relationships (such as how non-competes promote investment into specific skills).

All of these instances hinder competition as a process, as they result in "*increased*" concentration or enhanced collusion—at least to some extent. But that does not mean they are presumably "*bad*" and "*harmful to competition*." On the one hand, they could all just as easily be an *outcome* of competition on the merits. On the other hand, they could trigger a *process* of competition on the merits. Indeed, while in many cases, more competitors are better, driving inefficient business units, large or small, out of the market as a result of lower prices does not constitute an outcome that deserves prophylactic antitrust intervention.

Second, the CWS reduces the type 2 error of false acquittal when straight limitations of competition are too costly to observe. A great deal of business conduct or mergers covered by antitrust law does not produce immediate or obvious effects on competition. Vertical and conglomerate mergers, transactions that remove small firms without revenue-making products from the market, certain vertical restraints like resale price maintenance, some horizontal

[94] Tim Wu, *After consumer welfare, now what? The 'protection of competition' standard in practice*, COMPETITION POLICY INTERNATIONAL (Apr. 2018) available at: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3294&context=faculty_scholarship/.

agreements like information-sharing schemes, or even discount pricing policies for durable goods only conjecturally harm competition. They thus require a projection of likely future outcomes to find (or refute) liability. For example, theories of harm based on input or customer foreclosure rely on conjectures about the merged firm's post-transaction behavior. Only the CWS can provide meaningful targets for these projections.

2.The CWS dominates the Competition in New Areas of Discretion

The CWS gives the antitrust court a criterion of social choice to separate good from bad collusion, monopolization or merger. This limits judicial discretion in ways that circular standards of protection of competition or the competitive process do not. However, detractors of the CWS have advanced two further objections. First, the implementation of CWS gives rise to new areas of discretion **(a)**. Second, the CWS' discretionary fixation on price blinds it to non-welfare criteria **(b)**. Below, we will explain why both critiques are overstated.

a. New Areas of Discretion under the CWS

Critics object that the CWS entails discretion , and to an extent, they are right as every standard leaves some discretion to courts. [95]

However, the critics overstate the degree of "*indeterminacy*" of the CWS. Asking whether restraints of competition allow a firm to increase consumer prices by restriction of market output is a narrower discretionary exercise than asking whether there is a distortion of the competitive process.[96] Examples of the narrow discretion problems faced by antitrust courts under the CWS can be taken from the merger field:

- A merger leads to higher consumption prices and lower output. At the same time, the merger leads to production cost efficiencies that represent higher transfers to workers, managers and firms' owners. The discretion problem is this: which interest should be preferred, given that workers, managers, and firms' owners are all consumers?

- A merger leads to higher consumption prices and lower output. At the same time, higher profits from the merger finance internal R&D expenditure and incentivize capital markets to support the merged firm's investments. Which interest should be

[95] *Id*.

[96] US doctrine conditions a finding of liability under the Sherman Act to either (i) direct proof of supra- competitive prices or output restrictions or (ii) indirect proof of acquisition, maintenance, or consolidation of market power.

preferred: losses of allocative efficiency in the short term or gains in dynamic efficiency in the mid to long term?

- A merger creates a dominant position in market A, but the merged firm faces competition in all other markets B, C, D, and Z. The merger leads to higher consumption prices and lower output in market A. At the same time, the merger produces business-wide cost-reducing efficiencies. Consumers in market A lose from the merger and consumers in markets B, C, D, and Z gain from the merger. Which interests should be preferred: the welfare of consumers in A or the welfare of consumers in all other markets (ie society)?

- A merger between the two only sellers of differentiated products creates a monopoly. Product differentiation goes down as one product is phased out. But consumer prices go down. Should consumer prices or choice be favored?

- A merger in a competitive market yields cost efficiencies. Workers are laid off. Cost efficiencies are transferred to consumers through lower prices. Which interest should be preferred, given that workers are also consumers?

Most such discretion problems do not entail a degree of indeterminacy as deep as with alternative standards.[97] This is because a CWS filter makes the welfare tradeoffs of mergers explicit. Courts exercise discretion under transparency when they attempt to solve welfare tradeoffs in one way or the other. Their answer is not predetermined by the CWS, but their answer is open to discussion and review. This is different from the opaque "*I know it when I see it*" evaluations allowed under alternative standards.

One example of discretion under transparency can be found in *FTC v Staples*, where the District Court blocked a 3 to 2 merger between retailers of office. The Court relied on empirical evidence of higher prices in markets with 2 players, and on a low 15-17% pass through rate for the claimed efficiencies. The Court, however, explained the defendants for their product innovation track record and observed that the defendants had been "*hoisted by their own petards*" by "b*eing punished for their own successes and for the benefits that they have brought to consumers*".[98]

[97] See in general, Douglas Melamed and Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. IND. ORG. 741 (2018).

[98] *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997).

The transparency of the CWS is a great advantage as it allows incremental problem-solving and consensus-building.[99] Furthermore, the discussion revolves around small and technical issues manageable by experts at a trivial cost to society.[100] Finally, it maintains the predictability of antitrust law, which is key to economic prosperity and the rule of law.

b. Non-Economic Blind Spots under the CWS

Critics of the CWS consider that it does not allow antitrust law to protect important non-economic values, particularly political values.[101] The critics do not identify the "*political values*" they have in mind. The argument is, at any rate, overstated for the following reasons.

First, the alternative standards of protection of competition or the competitive process do not fare obviously better at protecting political values. The reason is simple: few studies demonstrate the existence of structural relations between competition and political values.

Take democracy; most of the available research to date shows that only extreme levels of monopolization or cartelization enable extreme concentration of political power and, in turn, deviations from democracy.[102] Such levels of monopolization or cartelization would likely be deemed unlawful under existing antitrust law under the CWS. Beyond this, the economic evidence suggests that business size and monopoly power correlate with lobbying expenditure but does not neatly establish a link between lobbying expenditures and successful rent-seeking.

The same is true of other political values like the environment or privacy. In fact, a case may be made that output-reducing (public) monopolies or cartels could provide appropriate economic structures to reduce carbon emissions or personalized advertisement. It is well

[99] One historical example of this is when courts settled on the idea that the CWS applied to end consumers and business buyers. Today, the consensus on the above areas of discretion is this. Antitrust courts use a total welfare test to decide which wealth transfers to prioritize (a); take a cautious view towards the long term (b), out of market efficiency (c), or the veracity of labor market harms when output grows (e); and adopt an adverse stance against mergers to monopoly (d). Reexaminations of the consensus are possible. Influenced by the common law process, US courts have reassessed antitrust doctrine in light of progress in economic theory. Today, economic scholarship shows that mergers can produce adverse market power effects on labor markets, independent from the price cost efficiencies they generate on product markets. The answer to (e) could change. Similarly, research on dynamic competition shows that while mergers may reduce "innovation competition" by removal of rival R&D pipelines, they also increase innovation potential by allowing the redirection of non-sunk R&D investment towards innovation targets. The current answer to (d) is not a stable equilibrium.

[100] Terry Calvani, *Rectangles & (and) Triangles: A Response to Mr. Lande*, 58 ANTITRUST L.J 657 (1989).

[101] See, in general, Section I.

[102] Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315 (2019).

known that Sweden, for example, uses a system of monopoly government stores to regulate retail alcohol sales and fight alcoholism.

Second, the CWS is flexible enough to address all or most restraints of competition that displace political values like privacy, sustainability, or equality. Privacy losses may be modelled as increases in the quality-adjusted price of a service. Sustainability gains may be modelled as decreases in the quality-adjusted price of a product and inequality may grow with the distributional effects of market power.[103] In reality many of our socio-political preferences of the day may be modelled as a CWS issue.

Conclusion

The neobrandeisian critique worked to an extent by prompting a healthy reexamination of established canons of antitrust law and through encouraging antitrusters to self-reflect upon their practices. However, the faults of the neobrandeisian critique became apparent when the movement weakened, and the CWS came out stronger.[104] The key learning outcome is this: unless the Courts and Congress abandon reading the Sherman Act as a "basic charter of economic freedom" and its construction as a common law device of economic policy, all present and future attacks on the CWS are set to fail.[105] The neobrandeisian critique is right antitrust law might be political but it misses the broader point. Antitrust law is political in the same way that any economic system ordered by the rule of law, democracy, and liberal philosophy is the result of a political choice. It ultimately emerges — if it is not evident from the beginning — that such systems work best when they are guided by competition. Much in the same way, antitrust laws work best under a CWS. Thus, while neither a liberal political economy nor antitrust laws are politically inevitable, once these are chosen as the guiding principles of a social order, the CWS tends to emerge naturally as antitrust law's true universal.

[103] This would only occur so long as there is no difference in relative income distributions among consumers, workers, and firm owners.

[104] Obviously, the neobrandeisian critique may wield its power on other aspects of antitrust law, or on academic practices.

[105] *Vendo Co. v. Lektro-Vend Corp*., 433 U.S. 623, 662 (1977) (Stevens, J., dissenting).