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Foreword: Antitrust's Pursuit of Purpose

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SYMPOSIUM

THE GOALS OF ANTITRUST

FOREWORD:
ANTITRUST'S PURSUIT OF PURPOSE

*Barak Orbach**

Consumer welfare is the stated goal of U.S. antitrust law. It was offered to resolve contradictions and inconsistencies in antitrust. The Supreme Court adopted it believing that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’” Alas, since the introduction of the standard, antitrust has been searching for its purpose. This Foreword introduces the debate on the goals of antitrust and briefly presents perspectives in this debate.

In 1963, fifty years before the publication of this Symposium, Robert Bork embarked a fifteen-year journey in antitrust. His journey opened with a provocative essay in *Fortune* magazine that he wrote with his colleague at Yale Law School, Ward Bowman: *The Crisis in Antitrust*.¹ It ended in 1978 with the publication of his influential book *The Antitrust Paradox*.² Bork’s journey in antitrust focused on actual and perceived contradictions and inconsistencies in antitrust law. It was part of a broad intellectual-ideological movement that built a body of scholarship, expressing confidence in markets and skepticism in the government.³ Bork’s antitrust scholarship was exceptionally influential.⁴ The Supreme Court endorsed some of his policy prescriptions. Most prominently, in 1979, in *Reiter v. Sonotone*, relying in Bork’s academic work, the Supreme Court declared

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1. Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, *FORTUNE*, Dec. 1963, at 138, *reprinted in* 65 *COLUM. L. REV.* 363 (1965).

2. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

3. For general characteristics of this movement, see Barak Orbach, *What Is Government Failure?*, 31 *YALE J. REG. ONLINE* (forthcoming 2013), *available at* <http://www.orbach.org/publications/government-failure/>. For the interactions between this movement and antitrust, see Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 *FORDHAM L. REV.* 2543 (2013).

4. *See, e.g.*, Douglas H. Ginsburg, *Judge Bork, Consumer Welfare and Antitrust Law*, 31 *HARV. J.L. & PUB. POL’Y* 449 (2008); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 *HARV. J.L. & PUB. POL’Y* 217 (2010).

that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”⁵ Since then, “consumer welfare” has been serving as the stated goal of U.S. competition laws.⁶

There is no debate that “consumer welfare” is the stated goal of antitrust law, nor is there any disagreement that the Supreme Court’s adoption of the consumer welfare standard was done with no discussion and was erroneous. However, the introduction of the consumer welfare standard sparked a great controversy over the meaning of the term in antitrust and the desirable goals of antitrust. It is fair to state that the introduction of the standard placed antitrust at war with itself. In effect, the consumer welfare standard established an antitrust paradox of the kind Robert Bork sought to resolve.

Antitrust has been searching for its purpose since the introduction of the consumer welfare standard.⁷ This pursuit of purpose has opportunity costs that have inevitably burdened intellectual progress in antitrust. David Hyman and William Kovacic vividly described conflicts surrounding antitrust’s pursuit of purpose:

U.S. antitrust professors have their own version of the Marquess of Queensberry Rules. The most important rule is that arguments about the merits of any given case, dispute, or regulatory decision/action must be faithful to the Gospel of Antitrust (i.e., the specific history, logic, and objectives that justified the adoption of the U.S. competition laws in the first place).

Of course, it complicates matters slightly that there are at least three competing versions of the Gospel: the Chicago School, the post-Chicago School, and the Market-Egalitarian School.⁸

Reflecting on his policy prescription for the goal of antitrust in 1967, Robert Bork noted: “If I am correct, reform is needed, but it need not come from Congress. Antitrust policy is determined . . . by the Supreme Court.”⁹ The works in this Symposium illustrate that a reform is indeed needed. By defining the goal of antitrust with an ambiguous phrase, the Supreme Court created a redundant pursuit of purpose that has been feeding debates in the field. The Court, therefore, should consider the meaning of the goals of antitrust laws.

In 1979, the Supreme Court adopted the consumer welfare standard with no discussion. The Court has been referring to and applying this standard

5. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 2, at 66). For the events that led to the adoption of the “consumer welfare” standard, see Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013).

6. See generally Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

7. See also Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2180 (2013) (“Our conversation about the goals of antitrust is unusual when compared with the way legal scholars talk about other fields.”); Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157 (2013).

8. David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2163 (2013).

9. Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 242 (1967).

ever since although it has never considered its (lack of) meaning or soundness. The Court may keep doing so for a few more decades. Such a path, however, takes the logic out of antitrust law, leaving “bad economics and worse jurisprudence.”¹⁰ The Symposium in this issue of the *Fordham Law Review* offers a collection of perspectives on the goals of antitrust laws, written by a diverse group of antitrust scholars. Our works present the controversy and refer to other key works in this debate.

Most of the works in this Symposium expressly criticize the unproductive nature of the debate over the goals of antitrust, stressing the need for clarity. For example Eleanor Fox dedicated her provocative essay, *Against Goals*, to this point, arguing that the goals controversy “has obscured the real debate, which is about how to achieve robust markets.”¹¹ Herbert Hovenkamp observed that “[t]he volume and complexity of the academic debate . . . creates an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy. Few if any decisions have turned on the difference” between the competing approaches.¹² The debate consists of a large number of perspectives, some of them conflict and others complement each other.

(a) *The Borkian Perspective.* Robert Bork sparked the controversy by arguing that the goal of antitrust ought to be “allocative efficiency,” which he equated with the phrase “consumer welfare.” Further, Bork believed that the word “competition” was confusing, because the word is mostly “a shorthand expression for consumer welfare.”¹³ In this Symposium, Herbert Hovenkamp argues that the “dominant view of antitrust policy . . . is that . . . antitrust promotes allocative efficiency.”¹⁴ Alan Meese presents the theoretical foundations of the debate, arguing that the competing welfare standards are inherently flawed and making the case for efficiency as the goal of antitrust.¹⁵

(b) *The Original Intent Perspective.* The stated goal of antitrust is “consumer welfare” because, in 1979, the Supreme Court casually stated that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”¹⁶ One layer of the goal controversy is influenced by another controversy—the role “originalism” should play in statutory interpretation. Robert Bork was a vocal advocate of originalism. While the Supreme Court endorsed his findings regarding the original intent of the Sherman

10. *Id.*

11. Fox, *supra* note 7, at 2161.

12. Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2474 (2013).

13. BORK, *supra* note 2, at 61. For discussion of Bork's thesis, see Orbach, *supra* note 6; Orbach, *supra* note 5.

14. Hovenkamp, *supra* note 12, at 2471.

15. Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 *FORDHAM L. REV.* 2197 (2013).

16. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 2, at 66). For the events that led to the adoption of the “consumer welfare” standard, see Orbach, *supra* note 5, at 2268–75.

Act, these findings have no support in the record. Thus, the debate over the goals of antitrust has kept antitrust scholars studying the legislative history of a statute enacted in 1890. In this Symposium, Dale Collins provides a study of the rise of the nineteenth century trusts and their influence on antitrust legislation.¹⁷ My Essay presents the state of economic thinking at the end of the nineteenth century, and argues that, at the time, the meaning of “no trusts and combinations” was “competition.”¹⁸

(c) *The Consumer Welfare Perspective.* In 1982, Robert Lande introduced the most influential critique of Bork’s study of the legislative intent of the Sherman Act.¹⁹ Lande argued that, by passing the Sherman Act, Congress indeed intended to promote consumer welfare, not “efficiency” as Bork proposed. Put simply, Lande argued that “consumer welfare” means “consumer welfare,” rather than “efficiency.” In the three decades that followed Lande and others have developed a meaning for antitrust consumer welfare.²⁰ In this Symposium, Robert Lane explains his critique of efficiency and the rationale for his thesis that prescribes “consumer choice” as the original and desirable goal of antitrust law.²¹ Commissioner Joshua Wright and Judge Douglas Ginsburg disagree.²² They argue that consumer welfare cannot serve as a goal of antitrust law, even though we refer to the goal with the phrase “consumer welfare.”

(d) *The Anti-Trust Perspective.* The origins of U.S. competition laws lie in efforts to address the rise of the nineteenth century trusts.²³ Fears of bigness have remained as shadows in antitrust.²⁴ The sentiments of protecting consumers and small businesses from large businesses have evolved and transformed over time but have never vanished. John Kirkwood’s Article provides a modern exposition for the goal of “protecting consumers and small suppliers from anticompetitive conduct.”²⁵

(e) *The Consumer Surplus Perspective.* The antitrust methodology utilizes a framework of partial equilibrium that does not accommodate welfare estimates.²⁶ This economic framework, however, can accommodate surplus analysis when data is available. The difference

17. Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279 (2013).

18. Orbach, *supra* note 5.

19. Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

20. See, e.g., Robert Lande & Neil Averitt, *Using the “Consumer Choice Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007).

21. Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013).

22. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).

23. See generally Collins, *supra* note 17; Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

24. Orbach & Campbell, *supra* note 23.

25. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2469 (2013).

26. See generally Meese, *supra* note 15; Orbach, *supra* note 6.

between surplus and welfare is significant. Surplus is merely the difference between the two values: willingness to pay and price, or the price charged customers and the seller's cost. Welfare incorporates all effects of a particular activity; it is the surplus plus the actual effects on well-being.²⁷ One economic version of the "consumer welfare" standard equates the phrase with "consumer surplus." This approach effectively means that the goal of antitrust is to protect low prices.

(f) *The Total Surplus Perspective.* Many antitrust scholars argue that the focus on consumer surplus may prevent firms from gaining efficiencies, if such efficiencies would result in price increases. They therefore argue that the current goal of antitrust, "consumer welfare," ought instead to be "total surplus."²⁸ Under this standard, an action or conduct may be socially desirable even if it results in a decrease in the consumer surplus because of offsetting gains in the producer surplus. Roger Blair and Daniel Sokol explain this approach and its significance.²⁹ Herbert Hovenkamp compares differences between the consumer surplus and the total surplus perspectives.³⁰

(g) *Competition.* My Essay in this Symposium shows that until the introduction of the consumer welfare standard, "competition" was understood to be the goal of antitrust law.³¹ Robert Bork argued that the word competition was too vague and confusing to be used in antitrust policy and generally served as "a shorthand expression for consumer welfare."³² His consumer welfare prescription replaced the goal of competition to enhance clarity in antitrust. The goal controversy is the outcome of this erroneous premise. I argue that competition should indeed serve as the goal of U.S. competition laws, that is, antitrust.

(h) *The Noneconomic Perspective.* Robert Bork criticized antitrust for the use of "bad economics."³³ Some of his critics rejected the notion that economics exclusively governs antitrust. They pointed out that politics, values, and ideology have always played a role in antitrust, and in fact influenced Bork's own analysis. The modern noneconomic perspective consists of two threads that acknowledge the influence of political and ideological forces on antitrust. They differ in their normative starting point. One thread perceives such influence as desirable, while the other accepts it as an inevitable reality. Several works in this Symposium present this

27. To illustrate the difference, consider the consumer choice to purchase cigarettes. The surplus differs from the welfare because of health effects. This is true both for the consumer welfare and the total surplus because of externalities. Similar analysis applies to most products.

28. The classic exposition is Oliver E. Williamson, *Economics As an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

29. Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013).

30. Hovenkamp, *supra* note 12.

31. Orbach, *supra* note 5.

32. BORK, *supra* note 2, at 61. For discussion of Bork's thesis, see Orbach, *supra* note 6; Orbach, *supra* note 5.

33. Bork, *supra* note 9, at 242.

perspective. Alan Meese frames the debate over economic standards and observes that “[t]he choice between competing definitions of ‘consumer welfare’ is ultimately a normative one; economic theory cannot make the choice for us. At the same time, such theory can inform or frame the debate in a way that might influence the normative outcome.”³⁴ Maurice Stucke rejects the idea that “[c]ourts and enforcers should . . . constrict competition policy to narrow economic goals.”³⁵ Rather, Stucke proposes that they “must reincorporate competition law’s political, social, and moral objectives.”³⁶ Harry First and Spencer Waller provide an account of the role of antitrust in a democratic society.³⁷ Jonathan Baker expresses unequivocal confidence in the “indispensable role of economics in shaping and applying modern antitrust” and explained how political forces influence antitrust policy.³⁸ Finally, Commissioner Joshua Wright and Judge Douglas Ginsburg provide a sharp critique of the use of noneconomic criteria in antitrust analysis.³⁹ They do not deny the influence of noneconomic forces on antitrust but explain why noneconomic perspective should not be actively used in antitrust analysis.

(i) *The Institutional Perspective.* While antitrust has been searching for its purpose, antitrust agencies have been enforcing antitrust laws. Two papers in this Symposium address the practical aspects of enforcement. David Hyman and William Kovacic posit that reality is much more nuanced than the academic debate and, in practice, competition agencies try to promote many goals.⁴⁰ Finally, Steven Salop offers a comprehensive analytical framework for merger settlement that clarifies the most practical aspect of today’s antitrust enforcement and illustrates the practicability of the controversy over the goals.⁴¹

34. Meese, *supra* note 15, at 2199.

35. Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575, 2645 (2013).

36. *Id.*

37. First & Waller, *supra* note 3.

38. Baker, *supra* note 7, at 2176.

39. Wright & Ginsburg, *supra* note 22.

40. Hyman & Kovacic, *supra* note 8.

41. Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647 (2013).