THE FUNDAMENTAL GOAL OF ANTITRUST: PROTECTING CONSUMERS, NOT INCREASING EFFICIENCY

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This article defines the relevant economic concepts, summarizes the legislative histories, analyzes recent case law in more depth than any prior article, and explores the most likely bases for current popular support of the antitrust laws. All these factors indicate that the ultimate goal of antitrust is not to increase the total wealth of society, but to protect consumers from behavior that deprives them of the benefits of competition. When conduct presents a conflict between protecting consumers and improving the efficiency of the economy (e.g., a merger that raises prices but reduces costs), no court in recent years has chosen efficiency over consumer protection.

The only exception is the law's determination to protect small sellers from price fixing and other anticompetitive behavior by buyers. This limited concern, however, is just the mirror image of Congress' desire to protect consumers from exploitation. In both buy-side and sell-side cases, the overarching goal is the same—preventing firms that have unfairly acquired power from imposing

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noncompetitive prices or other terms on their trading partners, thereby transferring wealth from the trading partners to themselves. This conclusion supports a more aggressive approach to many areas of antitrust enforcement, including mergers and joint ventures.

Introduction

The conventional wisdom in the antitrust community today is that the antitrust laws were passed to promote economic efficiency. This view, held by most economists, conservative scholars, federal enforcers, and practicing lawyers, is incorrect. Neither the sole nor even the primary purpose of these laws is, or ever has been, to enhance efficiency. Instead, as this Article demonstrates, the fundamental goal of antitrust law is to protect consumers.

Both the legislative histories of the antitrust laws and recent cases reveal this overarching purpose. Indeed, despite the appointment of increasingly conservative Supreme Court Justices and fourteen consecutive decisions for defendants,[1] current Supreme Court opinions focus much more on protecting consumers than on increasing efficiency. Like the overwhelming majority of recent lower court decisions that address the issue, these opinions indicate that the ultimate purpose of the antitrust laws is to provide the benefits of competition to consumers—lower prices, better products, and more choice—not to improve the efficiency of the economy. The fundamental goal of antitrust, in other words, is to protect consumers in the relevant market from anticompetitive behavior that exploits them—that unfairly transfers their wealth to firms with market power—not to increase the total wealth of society. When conduct presents a conflict between protecting consumers and promoting the efficiency of the economy (for example, a merger that raises prices but reduces costs), the courts have always chosen consumer protection over efficiency.[2]

The only additional goal of mainstream antitrust law is the law's determination to protect small sellers from price fixing and other anticompetitive behavior by buyers. This additional goal is sharply limited, however, because it applies only when antitrust enforcement would not cause consumers to pay supracompetitive prices. At a larger level, moreover, it is not a distinct goal at all: it is simply the

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1 *See* Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, ANTITRUST, Fall 2007, at 21, 22.

2 The view that consumer protection is the primary goal of the antitrust laws can also be referred to as a "purchaser protection," "buyer protection," "wealth transfer," "consumer impact," "price to consumers," "purchaser property rights," or "distributive" view.

mirror image of Congress' desire to protect consumers from exploitation. In both sell-side and buy-side cases, in other words, the ultimate goal is the same—preventing firms that have unfairly acquired power from exploiting their trading partners, buyers or sellers. In short, the goal is competitive prices (and other terms) for all.

The best known exponent of the contrary view is Robert Bork. Recognizing that the antitrust laws cannot be properly interpreted until their goals are determined,[3] he argued that the only permissible objective of these laws is to enhance economic efficiency.[4] In his famous article, *Legislative Intent and the Policy of the Sherman Act*, Bork appeared to demonstrate how the legislative history of the Sherman Act established that when Congress debated and passed the Sherman Act it had only one concern: increased economic efficiency.[5]

Although Bork published his article in 1966, his followers in the Chicago School gained significant control of the antitrust world only

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3 Bork explained:

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. . . . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.

ROBERT H. BORK, THE ANTITRUST PARADOX 50 (1993).

4 *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 44 (1966). Richard Posner relied upon Bork's analysis of the legislative history for his own assertion that only efficiency can play a role in antitrust. *See* RICHARD A. POSNER, ANTITRUST LAW 9–32 (2d ed. 2001). For other examples, see Lande, *supra* note †, at 67–69. By performing a legislative history analysis Bork went far beyond arguing that the best antitrust policy was one concerned only with efficiency. After all, reasonable people could disagree over which policy was optimal. Bork sought to trump what others thought of his efficiency-oriented policy view with his "strict constructionist" legislative history argument. The only question, he correctly maintained, is what Congress cared about. By making a legislative history argument rather than a "here is what is best" argument, Bork vastly raised the stakes. If he could freeze the argument over the goals of the antitrust laws through an analysis of their legislative histories, he would win the argument not just while the Chicago School was in power, but for all time.

5 *See* Bork, *supra* note 4. Bork argued that if the legislative debates were analyzed closely, the then-common "populist" views of antitrust—including the belief that the antitrust laws were passed to further a variety of social and political goals, such as combating the political power of big business, or assisting small businesses—were not a concern of Congress. *See id.* at 39–43. Bork asserted that even if social and political values might have motivated Congress to act, when it came down to the actual operation of the antitrust laws, Congress cared only about increasing the efficiency of our economy. *See id.* at 43–44. For a general discussion of the influence of Bork's analysis, see William E. Kovacic, The Antitrust Paradox *Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1437–39, 1445–51 (1990).

after President Reagan's 1980 election; control that grew during subsequent Republican Administrations.[6] Today, according to Judge Richard Posner, virtually everyone involved in antitrust agrees that the antitrust laws have a single objective—maximizing economic efficiency.[7] Judge Douglas Ginsburg recently came to a similar conclusion: "When Bork's article was first published in 1966, his thesis was novel. By 1977, it had become the conventional wisdom of the federal courts. . . . In emphasizing allocative efficiency over other values, the Supreme Court implicitly endorsed Bork's thesis."[8] Similar statements have been made by all of the George W. Bush administration's heads of the Justice Department's Antitrust Division,[9] his first Chair of

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6 Kovacic, *supra* note 5, at 1445 n.148, noted: "Reagan antitrust officials repeatedly embraced a single minded efficiency orientation." *See also, e.g.*, Robert E. Taylor, *A Talk with Antitrust Chief William Baxter*, WALL ST. J., Mar. 4, 1982, at 28 (quoting President Reagan's first Assistant Attorney General (AAG) for Antitrust, William Baxter: "The sole goal of antitrust is economic efficiency"). Likewise, an AAG for Antitrust in the first Bush administration recently proclaimed:

> [Twenty years ago] the only ones who refused to recognize this [efficiency] consensus were cranks and fuzzy thinkers on the fringe who were hostile to the cold efficiency of the market . . . .
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> . . . Regardless of the label, the 1980s concept of . . . total surplus . . . seems clearly to be the better animator of antitrust policy than today's "wolf-in-sheep's-clothing" version (which is really consumer surplus). It is impossible for me to discern any plausible benefit to interpreting the antitrust laws in a way that ignores productive efficiency whenever it serves to increase producer (as opposed to consumer) surplus.

Charles F. Rule, Consumer Welfare, Efficiencies, and Mergers: Statement for the Hearing of the Antitrust Modernization Commission "Treatment of Efficiencies in Merger Enforcement" 5–6 (Nov. 17, 2005), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Rule.pdf.

7 *See* POSNER, *supra* note 4, at ix ("Almost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic, or informed observer . . . agrees that the only goal of the antitrust laws should be to promote economic welfare . . . ."). By economic welfare, Posner means "the economist's concept of efficiency." *Id.* Posner further asserts that the "wealth-redistribution argument . . . has no implications for the content of antitrust policy." *Id.* at 24.

8 Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 227–28 (2006).

9 The current AAG for Antitrust, Thomas Barnett, said that the "[Supreme] Court has accepted the focus on economic efficiency and the use of economic analysis. Many of the recent decisions reflect no more than an application of these principles to outdated antitrust doctrines." Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, Luncheon Address to the Federalist Society: Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement 2 (Feb. 29, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/230627.pdf.

the Federal Trade Commission,[10] and also by the ABA Antitrust Section.[11] In an article contrasting the Chicago and Harvard Schools of antitrust, current FTC Chair William Kovacic restated the general view: "Both schools generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in the formulation of antitrust rules."[12]

The Bush administration's second AAG for Antitrust, R. Hewitt Pate, similarly observed: "'[T]he perfect [balancing] test in theory would of course be one that consistently and accurately condemned *all*, but *only*, that conduct which leads to a net decrease in economic welfare.'" Edward D. Cavanagh, Trinko*: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 ME. L. REV. 111, 123 n.120 (2007) (quoting R. Hewitt Pate, Testimony Before the Antitrust Modernization Commission Hearing Panel: Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts 8 (Sept. 29, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Pate_Statement.pdf).

In a major speech to the OECD, the Bush Administration's first AAG for Antitrust, Charles James, mentioned only one concern—efficiency. *See* Charles A. James, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks Before the OECD Global Forum on Competition: International Antitrust in the 21st Century: Cooperation and Convergence 7 (Oct. 17, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9330.pdf.

10 The Bush administration's first FTC Chair, Timothy J. Muris, wrote that efficiency enhancing mergers should be approved even if they resulted in higher consumer prices. *See* Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 GEO. MASON L. REV. 729, 733 (1999) ("Another beneficial change in the 1997 Revised Merger Guidelines is the rejection of a rigid requirement that cost savings must be 'passed on' to consumers."). This is consistent with his earlier article on the subject, which explicitly rejected all consideration of wealth transfer effects on consumers. *See* Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 393–402 (1980) [hereinafter Muris, *Efficiency Defense*].

11 *See* SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, ANTITRUST POLICY OBJECTIVES 4 (2003), *available at* http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf ("[O]ver time, the evolution of constitutional and economic theories and their perceived importance to antitrust review in combination with political, social and economic events, have led U.S. courts and antitrust agencies to adopt the current, more efficiencies-oriented, understanding of U.S. antitrust policy objectives as part of their interpretation and enforcement of federal antitrust legislation."); *id.* at 26–27 ("The promotion of competition in terms of efficiencies is the antitrust objective best suited to incorporating economic analysis within a competition review and, accordingly, is a fundamental and necessary competition law objective."). Although this document criticizes other possible antitrust objectives, including protecting small business and promoting national champions, it virtually ignores the wealth transfer effects of market power.

12 William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35. Kovacic also quotes Professor Jacobs' description of the prevailing view:

The purpose of this Article is to demonstrate that the conventional wisdom is wrong. The Chicago School's efficiency view is not only incorrect on the merits; it has not triumphed in the courts. The primary goal of antitrust is to protect consumers from paying higher prices to firms that have unfairly gained or maintained market power. The antitrust laws, in other words, can be explained as a congressional declaration that the property right we today call "consumers' surplus"[13] belongs to consumers,[14] not to cartels. While this certainly does involve the use of economic analysis, it is not efficiency analysis. Rather, the antitrust laws primarily were enacted to award this property right to purchasers of goods and services, and to prevent cartels and unjustified monopolies from taking it.[15] The ultimate objective of these laws, in short, is to protect consumers, not to increase overall efficiency.

This Article will define these concepts more precisely. It will then demonstrate that consumer protection was the primary reason for the passage of the antitrust laws, and is a far more plausible explanation than the efficiency goal. The only additional goal is the complementary and sharply limited concern for small business welfare in those few circumstances where this will not lead to supracompetitive prices.

The third Part analyzes the treatment of these issues in recent cases. It shows that Supreme Court and lower court opinions gener-

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> "Despite their differences, post-Chicago and Chicago scholars share a common metric. They agree that wealth maximization should be the exclusive goal of antirust policy, and antitrust enforcement should strive to achieve the highest practicable level of consumer welfare. They eschew the multivalent inquiries informing the Modern Populists' approach in favor of the single-minded pursuit of allocative efficiency."

Id. at 24 n.67 (quoting Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 242 (1995)).

Likewise, Kovacic concludes that "it is difficult to identify over the past twenty years enforcement actions that the FTC or the Justice Department predicated upon the achievement of goals other than the enhancement of economic efficiency." William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 464 (2003).

13 "Consumers' surplus" is the difference between what something is worth to consumers and the price they pay for it. *See* LUÍS M.B. CABRAL, INTRODUCTION TO INDUSTRIAL ORGANIZATION 16 (2000).

14 Unless noted otherwise, we use the term "consumers" to include all individual or business purchasers of products and services, regardless whether they are the ultimate end users. For the legislative and policy basis of this definition, see *infra* notes 45–47 and accompanying text.

15 Put differently, the antitrust laws define certain private property rights and protect them from being stolen by firms that have acquired market power without justification.

ally exhibit much more concern with protecting consumers than with enhancing efficiency. It also describes the courts' parallel determination to protect small sellers from exploitation. The fourth Part concludes that most voters today likely support antitrust enforcement not because it improves the efficiency of the economy, but because it protects them from higher prices. The final Part identifies the areas of antitrust law where the adoption of a consumer protection approach is likely to lead to more aggressive enforcement than an exclusive focus on efficiency.

I. Definitions: "Consumer Welfare," the Welfare of Consumers, and Efficiency

Since the critical terms in this area are sometimes used inconsistently, we begin by defining these concepts. The following standard diagram shows the economic effects of monopoly or cartel power. Monopolies and cartels usually raise prices above the competitive level. In economic terms this produces allocative inefficiency[16] (the "deadweight welfare loss"), represented by the triangle in the following diagram,[17] and also a taking of consumers' wealth by the monopoly or cartel, represented by the rectangle[18]:

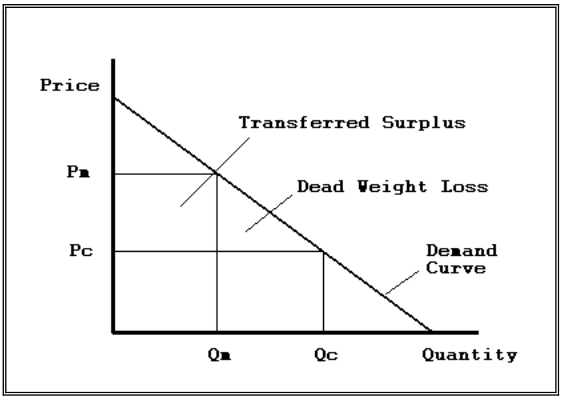
16 Supracompetitive pricing not only forces consumers to pay more. It also causes a form of economic inefficiency called allocative inefficiency:

> To raise prices a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This foregone production of goods worth more than their cost is pure social loss and constitutes the "allocative inefficiency" of monopoly. For example, suppose that widgets cost $1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for $2.00. A potential purchaser who would have been willing to pay up to $1.50 will not purchase at the $2.00 level. Since a competitive market would have sold [the] widgets for less than they were worth to him, the monopolist's reduced production has decreased the consumer's satisfaction without producing any countervailing benefits for anyone. This pure loss is termed "allocative inefficiency." For an extended discussion and formal proof that monopoly pricing creates allocative inefficiency, see E. Mansfield, Microeconomics: Theory and Applications 277–92 (4th ed. 1982).

Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 Antitrust Bull. 429, 433 n.17 (1988).

17 For a more detailed explanation of this diagram, see Bork, *supra* note 3, at 107–15.

18 *Id.* The price increase transfers the "consumers' surplus" in this rectangle to the monopoly or cartel. For the definition of "consumers' surplus," see *supra* note 13.



These concepts are crucial because Judge Bork developed via a lengthy, heavily footnoted text the argument that the original framers of the Sherman Act had a single intent: to enhance economic efficiency. Bork argued that "[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[19] Bork explicitly rejected distributive issues as a possible area of congressional concern: "[I]t seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity. It may be sufficient to note that the shift in income distribution does not lessen total wealth . . . ."[20]

Bork pointed to dozens of statements revealing an overriding congressional concern that trusts and certain other business forms would acquire monopoly (or market) power that would give them the ability to artificially raise prices and restrict output.[21] Bork wove these quotations into a convincing case that this concern preoccupied Congress.[22] He then used modern economic analysis to explain how monopoly power leading to higher prices for consumers can produce that form of economic inefficiency we today call "allocative ineffi-

19 BORK, *supra* note 3, at 91.

20 *Id.* at 111. Bork also rejected other possible congressional concerns, such as a concern with small business welfare. *Id.* For excellent summaries of the arguments regarding the wisdom of a large number of possible antitrust goals, see John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); Symposium, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965). For the history of this debate, see Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 377–82 (1965).

21 Bork, *supra* note 4, 12–21.

22 *See id.*

ciency."[23] Bork reasoned that since we now know that the "only" harm to "consumer welfare" from higher prices is economic inefficiency, congressional displeasure with market power can fairly be equated with a concern about economic efficiency.[24] He then presented a smaller, although still significant, number of quotations that manifest a congressional desire to preserve and enhance corporate productive efficiency.[25] On the basis of this evidence, Bork concluded that the antitrust laws embody only a concern for "consumer welfare" which he equated with the "maximization of wealth or consumer want satisfaction"[26] and the aggregate efficiency of our economy.[27]

Notice the subtle yet crucial change in terminology. Bork used "consumer welfare" as an Orwellian term of art that has little or nothing to do with the welfare of true consumers. His desire to maximize "consumer welfare" (which he defines as economic efficiency) carries with it no concern about the wealth extracted from consumers and transferred to firms with market power as a result of the higher prices that arise from cartel or other prohibited behavior. Bork thus defined "consumers" to include monopolists and cartels![28] Antitrust based on his definition of "consumer welfare" makes no distinction between "real" consumers—the purchasers of goods and services—and the firms with market power that raise prices and thereby extract wealth from purchasers. Higher prices to consumers are fine with Bork so long as the monopolist or the cartel produces more efficiently. In fact, the "consumers" who principally benefit under Bork's regime are monopolists and cartels.[29] If he had been honest, Bork would have

23 *See* BORK, *supra* note 3, at 98–101.

24 Bork also argued that only an efficiency orientation was administrable. He made a convincing case that even if there were any doubt as to congressional intent—he, of course, had none—the antitrust laws should be construed in an administrable manner. Since a social-political framework was so amorphous, he argued, administrability concerns also militated that the antitrust laws should be interpreted solely as a means of increasing economic efficiency. Indeed, Bork even pronounced all contrary views as being so incapable of predictable and administrable use as to be "unconstitutional." Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985).

25 *See* Bork, *supra* note 4, at 26–31.

26 *Id.* at 7.

27 BORK, *supra* note 3, at 91.

28 We are indebted to Professor Steven Salop for this and related articulations of this concept.

29 Under Bork's definition, "consumer welfare" is improved when economic efficiency is increased even if consumers in the relevant market are harmed. Technically, Bork can make this claim because the owners of monopolies and cartels are also consumers. Indeed, in the classic tradeoff situation, they are the "consumers" who princi-

used "total welfare" as the synonym for economic efficiency, the term employed by the economics profession for this purpose.[30]

Another crucial distinction is between the transfer of this consumers' surplus from purchasers to firms with market power, and the overall distribution of wealth in society.

To contrast the two, suppose a thief were to rob a Chicago School economist. If we asked the economist whether he or she objected to this robbery, that economist would surely reply that they did object, because stealing is inefficient.

The economist would be right insofar as stealing is inefficient. But, does society condemn stealing solely or even primarily because of its inefficiency effects? Isn't the principle reason society condemns stealing because it constitutes a taking of property without consent and without compensation? Stealing is an unfair transfer of wealth. A thief has no right to take the economist's money, and this is the reason why it is—and should be—illegal.

Moreover, we have no idea whether our hypothetical thief is more or less wealthy than our hypothetical economist. We have no idea what this theft would do to the distribution of wealth in our economy. Their respective wealth, however, is not connected to our decision to make theft illegal. It should be no defense to a charge of stealing for the robber to argue that he or she is poorer than the victim. We are not, and should not be, allowed to steal just because this might help even out the distribution of wealth. Stealing is an unfair taking of property, an unfair transfer of wealth. The law properly focuses on the taking, not the distribution of wealth.[31]

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pally benefit from a merger that raises price but increases efficiency. (Consumers in other markets may also benefit if the merger lowers costs, because that frees up resources for use in other markets, which will increase supply in those markets and may lower prices.) However, those who purchase from the merged firm—the consumers that Congress wanted to protect—are substantially worse off. They gain none of the efficiency benefits, absorb some of the allocative inefficiency losses, and have their surplus extracted by the firms with market power.

30 Many commentators have pointed out that Bork's terminology was confusing or misleading because economic efficiency, as commonly measured, consists of the *sum* of consumers' surplus and producers' surplus. The more accurate synonym for economic efficiency is total welfare (or a variant such as aggregate welfare, total surplus, or wealth maximization). *See* Jonathan B. Baker, *Competition Policy As a Political Bargain*, 73 ANTITRUST L.J. 483, 515 (2006); Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 430–32 (2005); Kirkwood, *supra* note †, at 47 n.11.

31 For an analysis of a Canadian case that incorrectly blurred this distinction, see *infra* note 171; *see also* Alan A. Fisher et al., *Legalizing Merger to Monopoly and Higher Prices: The Canadian Competition Tribunal Gets It Wrong*, ANTITRUST, Fall 2000, at 71 (analyzing wealth transfer and welfare in the context of the Canadian merger case).

In antitrust terms, if poor owners of yacht-making companies somehow formed an effective yacht cartel and raised the prices that millionaires paid for yachts, this cartel would violate the antitrust laws. The judge should not listen to the cartelists' argument that they were poorer than their victims.

For these reasons, the remainder of this Article will focus on the transfer of wealth caused by market power, not the distribution of wealth. The next Part will show that these transfers are the primary reason why the antitrust laws were enacted.

II. The Legislative History

A. *An Overriding Concern with Protecting Consumers' Property from Being Stolen, Not with Efficiency*

Which explanation for the passage of the antitrust laws is more likely[32]: enhancing economic efficiency, or preventing firms that have unfairly acquired or maintained market power from charging consumers supracompetitive prices?

The legislative history of the Sherman Act,[33] for example, contains many statements of concern by Senator Sherman[34] and other legislators[35] that some of the trusts and other businesses of the period had enough power—what we today would call market power—to raise prices. Judge Bork summarized this portion of the debates eloquently: "The touchstone of illegality is raising prices to consumers. There were no exceptions."[36] Since we know of no serious disagree-

32 As Judge Bork noted, the task of ascertaining the will of Congress should be "an attempt to construct the thing we call 'legislative intent' using conventional methods of collecting and reconciling the evidence provided by the Congressional Record." Bork, *supra* note 4, at 7 n.2.

33 15 U.S.C. §§ 1–7 (2006). For similar statements from the legislative history of the Clayton Act, 15 U.S.C. §§ 12–27 (2006), see Lande, *supra* note †, at 128; for similar statements from the legislative history of the Celler-Kefauver Act, 15 U.S.C. §§ 18, 21 (2006), see Lande, *supra* note †, at 135–36; for similar statements from the legislative history of the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006), see Lande, *supra* note †, at 112–14.

34 *See* 21 Cong. Rec. 2462 (1890) (statement of Sen. Sherman) (asking Congress to protect the public from trusts that "restrain commerce, turn it from its natural courses, increase the price of articles, and therefore diminish the amount of commerce"); *id.* at 2460 (statement of Sen. Sherman) (arguing that it is sometimes contended that trusts reduced prices to the consumer, "but all experience shows that this saving of cost goes to the pockets of the producer"); *id.* at 2457 (statement of Sen. Sherman) ("[Trusts tend to] advance the price to the consumer.").

35 *See, e.g.*, *id.* at 2558 (statement of Sen. Pugh) ("[T]rusts . . . [destroy] competition in production and thereby increas[e] prices to consumers . . . .").

36 Bork, *supra* note 4, at 16.

ment that this was indeed the preoccupation of the debates we will not discuss it further.

The key question, however, is precisely why Congress objected when the trusts raised prices to consumers. As noted in the previous Part, these higher prices cause two direct economic effects: the transfer of surplus from consumers to cartels, and allocative inefficiency. Which one was Congress' concern? Or were both of concern?

Was Congress, in 1890, worried about the deadweight welfare loss triangle? Or was their concern that higher prices caused an undesirable and unfair transfer of wealth from purchasers to firms with market power? Did Congress view cartels and monopolies that charged higher prices as analogous to the hypothetical thief discussed in the previous Part who stole money from the economist? The Sherman Act's legislative debates make this clear.

For example, Senator Sherman termed the higher prices "extortion,"[37] and "extorted wealth."[38] Others referred to the overcharges as "robbery,"[39] and a complaint was made that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people."[40] Another congressman complained that the beef trust "robs the farmer on the one hand and the consumer on the other."[41] Another declared that the trusts were "impoverishing the people" through "robbery."[42] Another declared that monopolistic pricing was "a transaction the only purpose of which is to extort from the community . . . wealth which ought . . . to be generally diffused over the whole community."[43] Another complained: "They aggregate to themselves great, enormous wealth by extortion . . . ."[44]

Do terms like "stealing," "robbery," "extortion," and "stolen wealth" sound like allocative inefficiency? Or is it more likely that Congress in effect awarded the property right which we today call "consumers' surplus" to consumers, and under the antitrust laws, the taking of consumers' surplus by cartels constitutes theft?

Congress wanted to protect those who purchased products and services; it made no distinction between wealthy and poor consumers,

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37 21 Cong. Rec. 2461 (1890) (statement of Sen. Sherman) (quoting Sen. George).

38 *Id.*

39 *Id.* at 2614 (statement of Rep. Coke).

40 *Id.* at 4101 (statement of Rep. Heard).

41 *Id.* at 4098 (statement of Rep. Taylor).

42 *Id.* at 4103 (statement of Rep. Fithian) (reading, with apparent approval, a letter from a constituent).

43 *Id.* at 2728 (statement of Sen. Hoar).

44 *Id.* at 1768 (statement of Sen. George).

or between business and individual consumers. Nor did Congress seem concerned about the issue of who ultimately bore the cost of monopoly overcharges (i.e., Congress did not seem concerned whether purchasers absorbed the overcharges or passed them on). Rather, Congress could see that prices to anyone who purchased from a monopoly or cartel increased, and passed the antitrust laws to prevent this from happening. While Congress frequently referred to "consumers," it did not appear to care only about ultimate consumers. Instead, Congress wanted to protect all who were overcharged.[45]

Thus, the best and most straightforward way to embrace Congress' concern for "consumers" would be to equate it to a concern with the direct purchasers of goods and services sold by cartels, monopolies, etc. In other words, any direct purchaser should be deemed a "consumer" for antitrust purposes, regardless of what he or she decided to do with the good or service purchased.[46] Otherwise every price rise caused by a monopoly, cartel, etc. would have to be examined to determine whether it had been absorbed by intermediaries or whether, and to what degree, it had been passed on to consumers. This can be a very difficult undertaking.[47] Firms that otherwise would have violated the antitrust laws should not be excused on the grounds that they "only" harmed business purchasers.

If there were any doubt about Congress' overriding desire to protect consumers, it is significant that in 1890 even economists were only just becoming aware of the concept we today call "allocative ineffi-

45 A number of decisions explicitly refer to protecting buyers, purchasers or customers (not just consumers). For example, the Court noted in *Associated General Contractors of California, Inc. v. California*, 459 U.S. 519, 538 (1983): "As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition." *See also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) ("The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. . . . As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows."); La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (*In re* Cardizem CD Antitrust Litig.), 332 F.3d 896, 904 (6th Cir. 2003) ("[T]he very purpose of antitrust law is to ensure that the benefits of competition flow to purchasers of goods affected by the violation.").

46 It would be a complicated, time-consuming, and useless task to attempt to determine precisely what happened to each good and service sold by a cartel. Depending upon the product, some would be consumed by direct purchasers, some would be resold, and others would be incorporated into different products.

47 Many of the complexities that would arise if the standard were limited to the welfare of ultimate consumers are analyzed in Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007). These problems can all be avoided, however, by focusing only upon the direct purchasers.

ciency."[48] In fact, the allocative inefficiency triangle that modern members of the antitrust community see so often (illustrated in Part I above) never appeared in the 1890 edition of Alfred Marshall's ground-breaking book *Principles of Economics*.[49] Moreover, even if economists were familiar with this concept, there is no evidence they had any influence on the passage of the Sherman Act.[50]

Even though Congress' main complaint about trusts—that they were perceived to raise prices—did not equate to a concern for allocative inefficiency, could Congress primarily have been concerned with corporate productive efficiency? Did Congress pass the Sherman Act primarily to save costs and increase corporate productive efficiency? For example, did Congress condemn Rockefeller because Standard Oil was so inefficient? Were very many people in 1890 in effect saying, "Curses on Rockefeller because he is so inefficient at producing oil! His inefficiency is ruining our country!"

Whatever bad things might or might not have been true, or believed to be true, about Rockefeller, we are not aware that he was ever publicly accused of inefficiently running his oil company.[51] To our knowledge he was never attacked for being inefficient.[52] Nor did the government ever assert that Standard Oil should be deemed to have violated the Sherman Act for being inefficient.[53]

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48 It was not until 1938 that the first modern and rigorous discussion of allocative efficiency appeared. *See* Harold Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242 (1938).

49 *See* ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (1890). Although he devoted seventeen pages of the 1890 edition of this landmark treatise to "The Theory of Monopolies," only one footnote included even an arguable reference to the concept, and the triangle we know so well today was not drawn anywhere in this book. *See id.* at bk. V, ch. XIV.

50 *See* RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 200 (1965) ("The Sherman Act was framed and debated in the pre-expert era, when economists as a professional group were not directly consulted by legislators. But even if they had been, they would have given mixed and uncertain advice.").

51 *See, e.g.*, Ida M. Tarbell, *The History of the Standard Oil Company*, MCCLURE'S MAG., 1902–1904. *See generally* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (1998).

52 *See* CHERNOW, *supra* note 51.

53 For an excellent and thorough analysis of the *Standard Oil* case, see James May, *The Story of* Standard Oil Co. v. United States, *in* ANTITRUST STORIES 7 (Eleanor M. Fox & Daniel A. Crane eds., 2007). May analyzed, inter alia, over 1800 pages of briefs filed by both parties and never found an attempt by the government to condemn the Standard Oil Company for being inefficient.

Of course, the Congresses that enacted the Sherman Act,[54] FTC Act,[55] Clayton Act,[56] and Celler-Kefauver Act[57] certainly did appreci-

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54 *See* 21 Cong. Rec. 2457, 2460 (1890) (statement of Sen. Sherman) ("[The bill] does not in the least affect combinations in aid of production where there is free and fair competition. . . . It is sometimes said of these combinations [the monopolistic trusts] that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer."); *see also id.* at 2457 (statement of Sen. Sherman) ("Experience has shown that they are the most useful agencies of modern civilization. They have enabled individuals to unite to undertake enterprises only attempted in former times by powerful governments. The good results of corporate power are shown in the vast development of our railroads and the enormous increase of business and production of all kinds.").

55 15 U.S.C. §§ 41–58 (2006). For an example of Congress' appreciation of corporate efficiency, see 51 Cong. Rec. 12,146 (1914) (statement of Sen. Hollis) ("Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest."); *see also id.* at 11,231 (statement of Sen. Robinson) ("Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling, while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'" (quoting William H.S. Stevens, a leading economist of the times)); *id.* at 8854 (statement of Rep. Morgan) ("To enable us to secure all the benefits and advantages of the large industrial unit and escape the evils and dangers thereof. . . . To relieve doubt and uncertainty in business, develop trade, encourage commerce, and promote enterprise."). Additional concern for efficiency can be found in the earliest proceedings of the FTC, which noted its desire in making rulings and orders "to promote business efficiency and, within the limits of practicability, to cooperate with the business world in developing the best standards of commercial ethics." 1916 FTC Ann. Rep. 26.

56 15 U.S.C. §§ 12–27 (2006). For an example of Congress' appreciation of corporate efficiency, see 51 Cong. Rec. 14,223 (statement of Senator Thompson) ("The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring."). For other discussions of the legislative history, see Muris, *Efficiency Defense*, *supra* note 10, at 393–402.

57 15 U.S.C. §§ 18, 21 (2006). For an example of Congress' appreciation of corporate efficiency, see *Corporate Merger and Acquisitions: Hearings on H.R. 2734 Before the Subcomm. of the S. Comm. on the Judiciary*, 81st Cong., 2d Sess. 59–61 (1949–1950) (statement of Rep. Emanuel Celler) ("[The] main reason for antitrust laws is that we believe the competitive system is more efficient than monopoly."); *see also id.* at 308 (statement of James L. Donnelly, Executive Vice President of the Illinois Manufacturers' Association) (expressing concern over the bill's "effect on prices, the effect on productive efficiency").

ate corporate efficiency. But they nevertheless passed the antitrust laws that in so many ways attacked these efficient corporations. If all they wanted was to encourage that form of industrial organization that was most productively efficient they would have praised the trusts, not condemned them in the legislative debates and enacted a law that condemned their activities. Congress must have been concerned with other goals.

This leaves the consumer protection explanation as being most consistent with the evidence. Even without the legislative history quotations,[58] which explanation makes more sense: congressional anger over perceived higher prices[59] meant Congress was concerned about consumers paying more to monopolies and cartels? Or either of the efficiency explanations (either congressional anger in 1890 because higher prices caused allocative inefficiency, or congressional anger because the Rockefellers of the day were inefficient at producing their products)?[60]

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58 Since the legislative history is so clear, one might ask how the efficiency orientation could have gained so much ground. We present three possible, non-exclusive explanations:

1. The presidency of President Reagan beginning in 1980 put into power enforcers and judges who were predisposed to accept the efficiency explanation.

2. The only available alternative to the efficiency model during the transition to the Reagan administration was the big is bad/small is good, social/political model, which was correctly perceived by decisionmakers as almost standardless and very difficult to administer in a predictable manner. *See, e.g.*, Bork, *supra* note 4, at 9. By contrast, the transfer approach is just as easy to administer, and just as predictable, as the efficiency model. *See* Alan A. Fisher et al., *Afterword: Could a Merger Lead to Both a Monopoly and a Lower Price?*, 71 CAL. L. REV. 1697, 1705–06 (1983) [hereinafter Fisher et al., *Afterword*]; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1684–91 (1983); Alan A. Fisher et al., *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777, 809–18 (1989) [hereinafter Fisher et al., *Horizontal Mergers*]. This model was not, however, available during the dawn of the Reagan administration, so it perhaps was natural that the decisionmakers instead opted for the model that economists were using—economic efficiency.

3. Confusion over the term "consumer welfare." Bork's extremely influential work advocated maximizing "consumer welfare," a seemingly pro-consumer objective. However, he defined the term so that it included a concern with the welfare of monopolies and cartels; prices could rise and "consumer welfare" could still increase. His deceptive use of the term "consumer welfare," instead of the more honest term "total welfare," was a brilliant way to market the efficiency objective. *See supra* notes 28–30 and accompanying text.

59 While Congress perceived that the trusts of the period were raising prices, the actual situation is much more complex. *See* Lande, *supra* note †, at 97–98.

60 As a double check, we challenge each reader of this Article to find ten intelligent friends and ask each: "Why might Congress have condemned cartels for raising prices?" We strongly doubt that any of them—other than friends with antitrust or

B. A Circumscribed and Sharply Limited Congressional Concern with Protecting Small Businesses

There is nothing left of the old pre-Chicago, social/political, big business is bad, small business is good, rationale for antitrust.[61] As the previous subpart demonstrated, the overriding goal of antitrust is protecting consumers' property from being stolen by firms with market power. But there might nevertheless be a sharply limited but distinctive way that antitrust can protect small businesses. This is because antitrust policy should be able to take small business' welfare into account so long as this does not cause consumers to suffer by paying supracompetitive prices.

A purely consumer-oriented view of the antitrust laws would omit an independent concern with the welfare of small businesses or sellers. But we would be left in a quandary over how to interpret and effectuate fairly a number of statements in the legislative history of the Sherman Act[62] that evidence a congressional desire to help protect sellers from being forced to sell at prices below the competitive level. For example, Senator Sherman believed that the trusts' subcompetitive pricing was as undesirable as their supracompetitive pricing:

> They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.[63]

Congressman Allison echoed: "[T]here is a combination in the city of Chicago which not only keeps down the price of cattle upon the hoof,

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economic training—would guess that the main problem with cartels is that they cause inefficiency. Author Lande has asked his antitrust law students these questions on many occasions. There is no doubt that the students find both efficiency explanations implausible. Some students often have a hard time even understanding the allocative inefficiency explanation.

61 For a discussion of the absence of legislative history on these issues, for those few other statements from the legislative history that did evidence a concern with small businesses, and for an explanation why this concern was meant to be subordinate to the Congressional concern for consumers, see Lande, *supra* note † , at 100–04.

62 The legislative history citations in this subpart were taken from Werden, *supra* note 47. This Article's interpretation of these statements from the legislative history, however, should not necessarily be attributed to Dr. Werden.

63 21 Cong. Rec. 2461 (1890) (quoting Sen. George) (internal quotation marks omitted).

but also . . . make[s] the consumers of beef pay a high price for that article."[64] Representative Taylor asserted:

> The beef trust fixes arbitrarily the daily price of cattle, from which there is no appeal, for there is no other market. The farmers get from one-third to half of the former value of their cattle and yet beef is as costly as ever. . . .
>
> This monster robs the farmer on the one hand and the consumer on the other.[65]

Representative Bland believed: "There is no trust in this country that to-day is robbing the farmers of the great West and Northwest of more millions of their hard-earned money than this so-called Big Four beef trust of Chicago."[66]

We submit that, even though the overriding concern of Congress was with protecting purchasers from paying supracompetitive prices, antitrust policy can and should take business welfare into account in those few situations that help businesses but do not cause consumers to pay supracompetitive prices. We believe these desires can be accommodated in the following manner: just as consumers should not have to face prices that are above the competitive level, so sellers should not have to face prices that are below the competitive level. Read this way, the antitrust laws embody a desire for competition and for competitive prices. These competitive prices are for everyone—sellers as well as for purchasers.

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64 *Id.* at 2470.

65 *Id.* at 4098.

66 *Id.* at 4099. Dr. Werden noted:

> Falling cattle prices and the role of the beef trust in bringing them about prompted the Senate to appoint a Select Committee on the Transportation and Sale of Meat Products to investigate whether "there exists any combination of any kind . . . by reason of which the prices of beef and beef cattle have been so controlled or affected as to diminish the price paid to producer without lessening the cost of meat to the consumer." After taking extensive testimony, the Committee submitted its report on May 1, 1890. The report reached no conclusion as to whether the companies had entered into "a combination . . . not to bid against each other in the purchase of cattle," but had no doubt that "the principal cause of the depression in the prices paid to the cattle raiser, and of the remarkable fact that the cost of beef to the consumers is not decreased in proportion, comes from the artificial and abnormal centralization of markets." The report urged the passage of the Sherman Act, which became law two months later when President Harrison signed the bill.

Werden, *supra* note 47, at 715–16 (internal citations omitted).

As a practical matter, there appear to be only two situations where this would differ from a purely consumerist orientation of the antitrust laws.[67]

First, this would mean that buyers' cartels and other anticompetitive behavior by buyers should continue to be illegal, regardless of whether such illegality causes higher prices for the product's ultimate consumers.[68] If buyers' cartels were legal, sellers could be forced to face prices that were below the competitive level. The legislative concern with competitive pricing suggests that buyers' cartels should be illegal even in those situations where the cartel is not likely to be able to raise prices to consumers due to, for example, a lack of downstream market power.

For example, in *Pease v. Jasper Wyman & Son*,[69] plaintiffs won a $56 million verdict in a case that involved a conspiracy to suppress the price paid to growers of wild blueberries.[70] There was no proof that defendants had the power to force blueberry purchasers to pay supracompetitive prices, but the jury found that the prices paid to blueberry growers had been depressed significantly. This decision correctly helped blueberry farmers without causing consumer prices to rise.

The second example of a way to implement a distinct concern with helping small businesses without causing consumers to pay supracompetitive prices is the area of failed predation. Successful predatory pricing should of course be condemned because it harms

67 We can also imagine a third situation in which antitrust law might want to protect small business. Suppose a firm was in the process of becoming a monopoly by systematically violating a non-antitrust law. For example, suppose the firm systematically used illegal child labor or paid less than the minimum wage, and these law violations gave it a significant cost advantage over its small competitors. To avoid this unfair competition, antitrust law might want to step in and protect the small competitors. To be sure, these law violations could lead to lower prices for consumers, at least in the short term. But consumers are entitled only to the absence of supracompetitive pricing, not to the low prices that could result from violations of the child labor or minimum wage laws. For this reason, lower prices caused by law violations should not count as consumer benefits under the antitrust laws.

68 *See infra* Part III.B. Buyers' cartels that lower prices to subcompetitive levels also can be condemned to the extent they cause allocative inefficiency. If the buyers' cartel can perfectly price discriminate, however, this allocative inefficiency might not arise. *See infra* note 170 and accompanying text.

69 845 A.2d 552 (Me. 2004).

70 Plaintiffs also won significant non-monetary relief that restructured anticompetitive pricing methods in the industry. *Id.* To avoid industry-wide bankruptcy, the plaintiffs settled with the buyers' cartel for roughly $5 million. *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 890 n.41 (2008).

consumers in the long run.[71] Failed predation also should be condemned even though it does not result in consumer harm[72] because it harms innocent businesses.

Suppose, for example, that the would-be predator miscalculated and is not able to recoup its below-cost losses due to the absence of barriers to new entry. Or suppose that the would-be predator calculated that it would be profitable to engage in predation even if there was only a twenty-five percent chance the predation would be successful, and this was one of the seventy-five percent of unsuccessful times.

The rival sellers should not have to face prices set artificially below the competitive level, just as consumers should not have to face prices set artificially above the competitive level. This conduct has no redeeming value and should be condemned.[73] While consumers benefited in the short term from the below-cost prices, these low prices should not count as an "antitrust benefit" because they were not the types of low prices the antitrust laws were designed to achieve. The main point of the antitrust laws is to prevent consumers from paying supracompetitive prices, not to provide them with artificially low prices.

The small business protection and consumer protection rationales for antitrust laws can be combined as follows. The antitrust laws give consumers the right to buy at competitive prices. Prices lower than competitive prices should not count as a consumer entitlement or property right, and they should be condemned because they unfairly harm innocent businesses.[74] This view of the antitrust laws would give a distinctive, but small and clearly limited, degree of protection to small businesses. Crucially, it would do so in a manner that did not interfere with Congress' primary goal of protecting consumers from paying supracompetitive prices.

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71 In the long run, successful predation causes consumers to pay supracompetitive prices. Successful predation thus could be condemned under either a "stealing from consumers" approach, or an efficiency rationale, because the long term supracompetitive prices cause allocative inefficiency. *See* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 403b (3d ed. 2007); 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 723(a) (2d ed. 2002).

72 Pricing below cost does not, of course, harm consumers. However, it does give rise to allocative inefficiency, and thus should be condemned under an efficiency model. *See* 3 AREEDA & HOVENKAMP, *supra* note 71, ¶ 739(c).

73 In order to avoid chilling legitimate price cuts, antitrust liability for failed predation should only be imposed if the plaintiff clearly proves that prices were below the competitive level and the defendant cannot establish any justification for its behavior. The defendant would be excused, for example, if it could show that it was offering a reasonable introductory discount on a new product.

74 There is no reason to presume these businesses are not equally efficient.

In only one of the antitrust laws has Congress elevated the protection of small business over the protection of consumers. In the Robinson-Patman Act,[75] passed during the Great Depression, Congress strengthened the prohibition in the Clayton Act against "secondary line" discrimination—discrimination that injures competing buyers.[76] Congress did this in order to make it more difficult for a large buyer to gain a competitive advantage over small buyers.[77] Since such a competitive advantage can benefit consumers—big buyers like Wal-Mart frequently use their purchasing power to lower prices to consumers—it is clear that Congress was more concerned with protecting small business than benefiting consumers.[78] While the Act can benefit consumers,[79] its overriding goal is not to promote consumer welfare but to shield small business from "unfair" competition.[80] The Robinson-Patman Act is the only area in antitrust law, therefore, where Congress was willing to subordinate its desire to protect consumers to some other goal.

III. The Case Law

In recent years, the case law has largely adopted the view that the ultimate goal of the antitrust laws is to protect consumers, not to

75 15 U.S.C. §§ 13, 13a–c, 21a (2006).

76 *See* Texaco Inc. v. Hasbrouk, 496 U.S. 543, 565–66 (1990). "Primary line" discrimination, in contrast, is discrimination that injures competing *sellers*. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

77 *See* FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948) ("The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.").

78 *See* Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 Antitrust L.J. 765, 770 (1991) ("It is quite clear that the underlying predicate of the Robinson-Patman Act was *not* consumer welfare. Rather, the Act was protectionist legislation.").

79 *See* John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 Antitrust L.J. 625, 647–51 (2005) (describing five scenarios in which substantial, persistent, and non-cost-justified discrimination induced by a powerful buyer can harm consumers).

80 *See, e.g.*, Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 175 F.3d 18, 23 (1st Cir. 1999) ("[T]he Robinson-Patman Act, unlike the Sherman Act, was meant less to protect consumer welfare than to protect small merchants . . . ."); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1446 (9th Cir. 1995) ("The Robinson-Patman Act stands on entirely different footing than the Sherman Act and Clayton Act. . . . [T]he framers of the Sherman and Clayton Acts intended to proscribe only conduct that threatens consumer welfare . . . . Fairness and protection of secondary-line purchasers are the concerns of the Robinson-Patman Act . . . .").

increase efficiency. While most decisions do not address the issue, those that do almost always indicate that the fundamental objective of antitrust is to improve the welfare of consumers. When courts use the term "consumer welfare," moreover, they do not appear to be referring to economic efficiency. Judges rarely describe the goal of antitrust as enhancing efficiency and, more importantly, they *never* say that conduct that harms consumers in the relevant market may be justified if it increases the efficiency of the economy. While it is possible that courts are using "consumer welfare" as Bork did, recent opinions provide little evidence of that.[81] In accord with the legislative history described above, most judges seem to believe that the aim of antitrust is to prevent behavior that deprives consumers of the benefits of competition and transfers their wealth to firms with market power.

Today, there is only one additional objective in mainstream antitrust law.[82] In cases involving restrictions on competition for inputs, the courts usually aim to protect input suppliers from exploitation, not consumers. Even in these buy-side cases, however, there are close parallels to the consumer-oriented approach of sell-side cases. The ultimate objective in both types of cases is to ensure that market participants—both buyers and sellers—obtain the benefits of competition. And in some of these cases, courts have refused to protect suppliers when doing so would harm consumers.

In subpart A, we show that recent case law has generally recognized that the ultimate objective of the antitrust laws is to protect consumers, not to enhance efficiency. In subpart B, we discuss the limited exception to that view: the courts' concern for supplier welfare in certain buy-side cases.

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81 To the contrary, some decisions are quite clear. When they use the term "consumer welfare," they mean the welfare of consumers, not the welfare of society or cartels. For most other cases, although we cannot be positive, we can still be pretty sure they are not referring to economic efficiency. They do not mention efficiency as an objective and they seem fixated on protecting consumers from higher prices, regardless of cost savings.

82 The Robinson-Patman Act is outside the mainstream because, as noted above, *see supra* note 80, its principal purpose is not to promote competition but to protect small business from competition in certain circumstances. Since its protectionist features are well known, *see, e.g.*, Kirkwood, *supra* note 79, we do not discuss the Act here. In fact, when we refer to the antitrust laws in the remainder of this Article, we mean the antitrust statutes other than the Robinson-Patman Act.

A. *The General Rule: The Overarching Objective Is to Protect Consumers, Not Enhance Efficiency*

In section 1, we provide an overview of the case law by explaining why most courts, even when they use the ambiguous term "consumer welfare," clearly or likely believe that in general, the preeminent objective of the antitrust laws is to protect consumers, not enhance efficiency. Then we examine the cases themselves. In section 2, we focus on recent decisions that identify the ultimate purpose of the antitrust laws or the ultimate test of whether those laws have been violated. In section 3, we discuss two types of cases in which courts have addressed a conflict between the welfare of consumers and economic efficiency. Finally, in section 4, we briefly describe a decision that required consideration of social goals as well as the welfare of consumers in an unusual context.

1. The Meaning of "Consumer Welfare"

As noted in Part I, the term "consumer welfare" is ambiguous, since it could refer either to the welfare of consumers in the relevant market or to economic efficiency. This ambiguity arose because Bork equated "consumer welfare" with the efficiency of the economy as a whole,[83] and the Supreme Court quoted Bork when it declared that the legislative history of the Sherman Act suggests it is a "consumer welfare prescription."[84] As a result, when courts use consumer welfare today, they could be invoking Bork's concept, not the literal meaning of the term, and thus could be indicating that what they really care about is total welfare, not the welfare of consumers. For four reasons, however, we doubt this is so.[85]

First, some decisions clearly take the position that the ultimate objective of antitrust law is to benefit consumers, not to increase effi-

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83 *See supra* notes 19–27 and accompanying text.

84 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing Robert H. Bork, The Antitrust Paradox 66 (1978)). In *Reiter*, the Court did not actually endorse Bork's definition of consumer welfare; it never addressed the issue. Moreover, it stated that the treble-damages remedy was passed "as a means of protecting consumers from overcharges resulting from price fixing." *Id.* Had the Court thought that the true goal of antitrust was to promote efficiency, not protect consumers, it would have said that the treble-damages remedy was passed to deter firms from imposing a deadweight loss on society. *See* Lande, *supra* note 16, at 445–47.

85 We are not alone in reaching this conclusion. *See* Gifford & Kudrle, *supra* note 30, at 432–33 ("[T]he U.S. courts do not appear to be employing [consumer welfare] in the total-surplus sense that Bork formally attributed to it. That is, the U.S. courts use the phrase, but they appear to be following an antitrust policy predicated on the maximization of consumer surplus rather than total surplus.").

ciency. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[86] the Supreme Court addressed a practice that could reduce allocative efficiency (failed predation)[87] but refused to condemn it even when it harmed efficiency because it would lower prices to consumers. In declaring that failed predation enhances consumer welfare, moreover, the Court measured consumer welfare not by total surplus but by the level of prices in the market.[88] In *Brooke Group*, in short, the Court equated "consumer welfare" with the welfare of consumers, not with total welfare, and accorded primacy to the former.[89] In *MetroNet Services Corp. v. Quest Corp.*,[90] the Ninth Circuit also distinguished "consumer welfare" from allocative efficiency.[91] And in three decisions, the Seventh Circuit stated that the objective of the antitrust laws is to prevent "overcharges to consumers"[92] or "transfers of wealth from consumers to producers."[93] Because these opinions were written by (or quoted) Judge Easterbrook, and because he understands the distinctions involved and even has declared that Congress passed the antitrust laws primarily to protect consumers from wealth transfers,[94]

86 509 U.S. 209 (1993).

87 *See supra* note 72 and accompanying text.

88 *See infra* text accompanying notes 109–110.

89 *See* Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 947 n.24 (2002) (noting that the *Brooke Group* Court gave primacy to consumer welfare over total welfare because the Court argued that "prices below cost are not problematic from an antitrust perspective, even though they are allocatively inefficient, because such prices increase consumer welfare").

90 383 F.3d 1124 (9th Cir. 2004).

91 *Id.* at 1136 ("Prohibiting a seller from eliminating arbitrage can diminish consumer welfare and allocative efficiency in the long run under some circumstances."); *see also infra* Part III.A.3.b.

92 Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 715 (7th Cir. 2006) ("'The principal purpose of the antitrust laws is to prevent overcharges to consumers.'" (quoting Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 368 (7th Cir. 1987))), *cert denied*, 127 S. Ct. 1328 (2007).

93 *See infra* note 139 and accompanying text.

94 *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702–03 (1986). When Congress passed the Sherman Act, the "choice they saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges." *Id.* This program differs from "one based on 'efficiency,'" though only at the margins. *Id.* at 1703. At other times, though, Judge Easterbrook has equated consumer welfare with allocative efficiency. *See* Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 347 ("[C]onsumers' welfare [is] a convenient shorthand for the allocative efficiency costs of monopoly."); *see also* L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 404 (7th Cir. 1997) (Easterbrook, J.) ("Antitrust law is designed to protect consumers from the higher prices—and society from

these cases also exhibit a clear preference for the welfare of consumers.

Second, while most opinions are less clear, they appear to support a consumer-oriented view of antitrust law because they focus on consumer impact rather than efficiency. In assessing the conduct at issue, they expressly examine its effect on things that matter to consumers—such as price, quality, or choice—but they never expressly examine its effect on total welfare. They do not mention producers' surplus; they do not compare gains in producers' surplus with reductions in consumers' surplus; and they do not ask whether increases in productive efficiency outweigh losses in allocative efficiency. While the opinions in *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*,[95] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[96] and *PolyGram Holding, Inc. v. FTC*[97] are particularly striking examples,[98] this focus on consumer impact is common.

Third, in recent years, very few decisions state that any aspect of efficiency is a goal of the antitrust laws and those that do refer only to allocative efficiency. If these courts had been following Bork, they would have mentioned productive efficiency as well.[99] Moreover, the decisions that identify allocative efficiency as a goal almost always treat

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the reduction in allocative efficiency—that occurs when firms with market power curtail output.").

95 127 S. Ct. 1069 (2007).

96 127 S. Ct. 2705 (2007).

97 416 F.3d 29 (D.C. Cir. 2005).

98 *See infra* text accompanying notes 111–16 (*Weyerhaeuser*), text accompanying notes 117–24 (*Leegin*), and text accompanying notes 129–33 (*PolyGram*).

99 *Cf.* BORK, *supra* note 3, at 91 ("The whole task of antitrust can be summed up as the effort to improve allocative efficiency *without impairing productive efficiency* so greatly as to produce either no gain or a net loss in consumer welfare." (emphasis added)); *id.* ("These *two types of efficiency* make up the overall efficiency that determines the level of our society's wealth, or consumer welfare." (emphasis added)). It is possible that the courts did not refer to productive efficiency because they had concluded that a case-by-case assessment of productive efficiency is unworkable, a position that both Bork and Posner have taken. *See id.* at 126 ("[T]he quantification of the productive efficiency factor . . . renders the problem utterly insoluble."); POSNER, *supra* note 4, at 112 ("[T]he measurement of efficiency [is] an intractable subject for litigation."); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 COLUM. L. REV. 252, 313 (1975). Contrary to the approach of Bork and Posner, however, it is now customary to examine the efficiency justifications for the defendant's conduct in any rule of reason analysis under § 1 or § 2 of the Sherman Act and in every case under § 7 of the Clayton Act. It seems unlikely, therefore, that productive efficiency and overall efficiency were not identified as antitrust goals because of administrability concerns.

it as a correlate of consumer impact, not an independent value.[100] They do not suggest that increases in allocative efficiency may outweigh harm to consumers.

Fourth, and most important, whenever the courts have addressed an actual or potential conflict between consumer well-being and economic efficiency, consumer interests have always prevailed. For the last fifteen years, if not earlier, no court to our knowledge has taken the position that an improvement in economic efficiency trumps an adverse impact on the welfare of consumers, as we show in section 3.[101]

2. Decisions Identifying the Ultimate Objective

In contrast to the assertions of Judges Bork, Ginsburg, and Posner,[102] antitrust decisions today rarely describe the ultimate goal of the antitrust laws as increasing efficiency. Instead, courts in recent years frequently state that the purpose of the antitrust laws is to protect consumers or enhance consumer welfare.[103] That has been true whether the decisions have emanated from the Supreme Court, the appellate courts, or the district courts.[104]

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100 *See infra* notes 131, 133, and accompanying text.

101 *See also* Edlin, *supra* note 89, at 948 n.25 ("Despite the wish of economists and their fellow travelers that the goal of antitrust be to promote overall efficiency, neither case law nor legislative history [in the U.S.] stands for the proposition that overall economic welfare or wealth maximization trumps low prices.").

102 *See supra* notes 4, 7 & 8.

103 To be sure, it is even more common for courts to say that the purpose of the antitrust laws is to promote competition or the competitive process. *See* Kirkwood, *supra* note †, at 30–31; Werden, *supra* note 47, at 724–29. Since the courts almost never define competition or the competitive process, however, these formulations do not provide a concrete guide for determining whether or not the antitrust laws have been violated. Suppose that a dominant firm eliminates its only rival by cutting prices and keeping them low. Does that conduct enhance competition or reduce it? The answer depends on the definition of competition. Without a commonly accepted definition, judges have to resolve antitrust issues either by resort to precedent or by specifying the aims of antitrust law more concretely. In recent years, many courts have specified the aims of antitrust more concretely by declaring that the purpose of the antitrust laws is to protect consumers.

104 Our survey covers decisions issued in the last fifteen years as well as a few significant earlier cases. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 595–96 (1976) ("But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation . . . controls are necessary to protect the consumer from exploitation."); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) ("The reason [that the overcharged buyer is entitled to treble damages] is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. . . . As long as

a. The Supreme Court of the United States

Generally, Supreme Court cases resolve antitrust issues without attempting to define what it means to promote competition under the antitrust laws. In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[105] for example, the Court stated: "Interbrand competition, our opinions affirm, is the 'primary concern of antitrust law.'"[106] The Court did not define interbrand competition, however, or spell out any general test for deciding whether interbrand competition has been enhanced or restricted. In the last fifteen years, only one Supreme Court opinion has gone that far. In *Brooke Group*, the Court identified the "traditional concern" of the antitrust laws as "consumer welfare and price competition."[107] Critically, however, the Court equated consumer welfare not with economic efficiency but with the benefits received by consumers in the relevant market. In analyzing whether unsuccessful predatory pricing should be illegal, the Court noted that below-cost pricing could sometimes cause allocative inefficiency.[108] It declared, however, that unsuccessful predatory pricing "produces lower aggregate prices in the market, and consumer welfare is enhanced."[109] In measuring consumer welfare by the level of prices in the market rather than by allocative efficiency, the Court signaled that the ultimate aim of antitrust law is to enhance the well-being of consumers in the relevant market, not maximize economic efficiency or minimize inefficiency. Thus, the Court noted that unsuccessful predation is in general a boon to consumers.[110]

In *Weyerhaeuser*, a more recent case challenging predatory bidding rather than predatory pricing, the Court returned to form and did not identify the ultimate objective of the antitrust laws.[111] In deciding whether to treat predatory bidding the same as predatory pricing, however, the Court repeatedly compared the effects of the two practices on consumers. In total, the *Weyerhaeuser* opinion contains twelve references to consumer impact (for example, "consumer

the seller continues to charge the illegal price, he takes from the buyer more than the law allows.").

105 546 U.S. 164 (2006).

106 *Id.* at 180 (quoting Cont'l T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977)).

107 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993).

108 *Id.* at 224.

109 *Id.*

110 *Id.*

111 *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

welfare,"[112] "lower prices to consumers,"[113] "consumer harm,"[114] "effect on consumer prices"[115]). The opinion contains no references to economic efficiency. Although the Court ultimately adopted a test for predatory bidding that depends on the practice's effect on suppliers, not consumers,[116] that is consistent, as we explain below, with the legislative history's concern with the transfer of wealth from innocent parties to firms with market power. Like the Congress that passed the Sherman Act, therefore, *Weyerhaeuser* focused on harm to participants in the relevant markets, not to the efficiency of the economy.

In *Leegin,* the Court came closer to explicitly equating the purpose of the antitrust laws with the interests of consumers. The Court noted, as it had in *Volvo,* that "the antitrust laws are designed primarily to protect interbrand competition."[117] It added, however, that a practice's impact on competition was directly linked to its impact on consumers. The Court stated that the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[118] In articulating this one-to-one correspondence between consumer impact and competitive impact, the Court nearly adopted a position that many lower courts have now taken—that the *test* of whether a practice harms competition is its impact on consumers.[119] Moreover, the Court did not refer to economic efficiency; it said that competition is valued because it serves "the consumer" and "the consumer's best interest." Elsewhere, the Court did state that the per se rule against resale price maintenance could cause manufacturers to engage in "inefficient" practices,[120] and it suggested that vertical price fixing was frequently efficient.[121] On the whole, however, the Court focused on the welfare of consumers. It repeatedly emphasized matters of concern to consumers such as price levels,

112 *Id.* at 1077 (quoting *Brooke Group*, 509 U.S. at 224).

113 *Id.* at 1077.

114 *Id.* at 1078.

115 *Id.*

116 *See id.*

117 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2718 (2007)

118 *Id.* at 2713.

119 *See infra* notes 135–44 and accompanying text.

120 *Leegin,* 127 S. Ct. at 2716.

121 *Id.* at 2717 ("Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical.").

product quality, and options.[122] It never mentioned "total welfare" or "total surplus," even in explaining why inefficient vertical practices were undesirable. On the contrary, the Court said that inefficient practices harmed "consumer welfare" because they forced consumers to pay higher prices.[123] The Court declared that the per se rule against vertical price fixing was "flawed antitrust doctrine" because it served the "interests of lawyers . . . more than the interests of consumers."[124]

b. Appellate Courts

Since the appellate courts decide many more antitrust cases than the Supreme Court, they have referred much more often in the last fifteen years to the ultimate purpose of the antitrust laws or to the fundamental test for determining illegality or injury under these laws. These references have almost always been to protecting consumers or consumer welfare, not economic efficiency. Recently, for example, the Seventh Circuit stated that "'The principal purpose of the antitrust laws is to prevent overcharges to consumers.'"[125] The Sixth Circuit quoted a trial court's statement that "'the very purpose of antitrust law is to ensure that the benefits of competition flow to purchasers of goods affected by the violation.'"[126] The Second Circuit declared: "The antitrust laws . . . safeguard consumers by protecting the competitive process."[127] The Ninth Circuit observed: "One of the challenges of interpreting . . . the Sherman Act is ensuring that the

122 *E.g.*, *id.* at 2715 ("Resale price maintenance also has the potential to give consumers more options.").

123 *Id.* at 2722 (noting that inefficient methods hinder consumer welfare "because consumers are required to shoulder the increased expense of the inferior practices"); *id.* at 2722–23 ("The increased costs these burdensome measures generate flow to consumers in the form of higher prices.").

124 *Id.* at 2723. Altogether, the Court referred to consumer interests twice as often as it referred to efficiency. *See id.* (twenty-five references to "consumers," "interests of consumers," "harmful to the consumer," and similar terms; three references to "consumer welfare"; and fourteen references to "efficiency," "inefficient," "wasteful," and similar terms).

125 Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 715 (7th Cir. 2006) (quoting Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 368 (7th Cir. 1987)), *cert. denied*, 127 S. Ct. 1328 (2007).

126 La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (*In re* Cardizem CD Antitrust Litig.), 332 F.3d 896, 904 (6th Cir. 2003) (quoting *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 651 (E.D. Mich. 2000)). The appellate court added that protecting consumers from higher prices "was undoubtedly a *raison d'etre* of the Sherman Act when it was enacted in 1890." *Id.* at 910.

127 Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 489 (2d Cir. 2004).

antitrust laws do not punish economic behavior that benefits consumers and [does not harm] the competitive process."[128] Writing for the D.C. Circuit, Judge Ginsburg described a practice condemned by an antitrust court as a practice that "stands convicted in the court of consumer welfare,"[129] and his opinion suggests he meant the welfare of consumers, not economic efficiency. When he summarized the FTC's methodology for evaluating horizontal restraints, first announced in *In re Massachusetts Board of Registration in Optometry*,[130] and explained why it was acceptable, he referred to impact on consumers eight times but never mentioned economic efficiency.[131] Most important, when he described what a defendant must show under the Commission's methodology to justify a restraint, he did not use the metric of economic efficiency. He did not say that a restraint would be justified if it enhances productive efficiency more than it reduces allocative efficiency, or if it increases producers' surplus more than it diminishes consumers' surplus. Instead, a defendant must show that "the restraint in fact does not harm *consumers* or has 'procompetitive virtues' that outweigh its burden upon *consumers*."[132] In short, Judge Ginsburg approved a methodology for evaluating horizontal restraints that sought to determine a restraint's impact on consumers, not economic efficiency.[133]

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128 Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 902–03 (9th Cir. 2008).

129 PolyGram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005).

130 110 F.T.C. 549, 602–04 (1988).

131 *See PolyGram Holding*, 416 F.3d at 35–37.

132 *Id.* at 36 (emphasis added).

133 Judge Ginsburg's opinion in *PolyGram* is consistent with the view he expressed to author Lande that mergers ought to be evaluated by their impact on price, not efficiency:

> "Particularly in view of the infrequency with which efficiency showings can convincingly be made on behalf of a proposed merger, a price-driven standard for mergers would do more to avoid lost efficiencies through over-enforcement (of the *Von's*, *Brown*, or *PNB* sort) than could possibly be lost by the occasional blocking of a merger that would be both price and efficiency enhancing."

Lande, *supra* note 16, at 460 n.118 (quoting Letter from Judge Douglas H. Ginsburg to Robert H. Lande (Feb. 3, 1988)).

In a recent article, Judge Ginsburg wrote that the Supreme Court has endorsed "allocative efficiency as the fundamental value underlying the antitrust laws." Ginsburg, *supra* note 8, at 230. The only cases he cited, however, were decided more than twenty years ago; he did not examine the recent decisions discussed in this chapter. Moreover, Judge Ginsburg simply showed that the older cases rejected populist goals and proclaimed that the ultimate aim of antitrust is consumer welfare. He did not establish that they equated consumer welfare with allocative efficiency rather than

Many other appellate decisions have also indicated that the ultimate test of whether a practice violates the antitrust laws is its impact on consumers. In *United States v. Microsoft Corp.*,[134] the most important appellate opinion in recent years, the D.C. Circuit declared: "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers."[135] Both the Eleventh Circuit and the Fourth Circuit have quoted this statement.[136] The Tenth Circuit stated: "To be judged anticompetitive, the [conduct] must actually or potentially harm consumers."[137] In order to show antitrust injury, the Third Circuit explained, a private plaintiff must point to an adverse effect on consumers in the relevant market: "We must consider competition from 'the viewpoint of the consumer,' looking at 'the prices, quantity or quality of goods or services' in the relevant geographic market for a product to determine if there has been an injury to competition."[138] Writing for the Seventh Circuit, Judge Easterbrook echoed the thesis of this chapter when he declared: "Calling the selection of components for one's product a 'tie-in' does not help to uncover practices that restrict output, drive up prices, and transfer wealth from consumers to producers."[139]

Other courts have stated that the ultimate test is whether the conduct enhances or reduces "consumer welfare." In *Rebel Oil Co. v. Atlantic Richfield Co.*,[140] for example, the Ninth Circuit declared: "Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare."[141] According to the Second Circuit, as a

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with protecting consumers in the relevant market. Although one of the older decisions cited Bork, none of them ever discussed what "consumer welfare" meant. *See, e.g.*, *supra* note 84 and accompanying text.

134 253 F.3d 34 (D.C. Cir. 2001).

135 *Id.* at 58 (emphasis omitted).

136 *See* Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071–72 (11th Cir. 2004); Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004); Dickson v. Microsoft Corp., 309 F.3d 193, 206 (4th Cir. 2002).

137 SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994).

138 Atl. Exposition Servs. Inc. v. SMG, 262 F. App'x 449, 451 (3d Cir. 2008) (quoting Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)), *cert. denied sub nom.* Casper v. SMG, 77 U.S.L.W. 3198 (Oct. 6, 2008).

139 Digital Equip. Corp. v. Uniq Digital Techs., 73 F.3d 756, 761 (7th Cir. 1996).

140 51 F.3d 1421 (9th Cir. 1995).

141 *Id.* at 1433; *see also* Abbouds' McDonald's LLC v. McDonald's Corp., 2006-2 Trade Cas. (CCH) ¶ 75,324 (9th Cir. July 7, 2006) (finding that plaintiff failed to "demonstrate that the defendant's alleged conduct had any effect on consumer welfare"); Ticketmaster Corp. v. Tickets.com Inc., 127 F. App'x 346, 348 (9th Cir. 2005)

rule of reason plaintiff must show that the challenged actions "'diminish overall competition, and hence consumer welfare.'"[142] The First Circuit observed that under the rule of reason, "adverse effects on consumer welfare are an important part of the equation."[143] A defendant's business justification, according to the Third Circuit, must relate "'directly or indirectly to the enhancement of consumer welfare.'"[144] Apart from *Rebel Oil*, however, these decisions do not define "consumer welfare," and for the reasons described in section 1, were probably referring to the welfare of consumers, not total welfare.[145]

c. District Courts

Following the unmistakable trend in the higher courts, many recent district court decisions have also recognized that the fundamental aim of the antitrust laws is to protect the welfare of consumers.[146] The few opinions that refer to economic efficiency, moreover,

("[The challenged contract clauses] do not unreasonably restrain trade, as there is insufficient evidence in the record that they harm consumer welfare."); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1136 (9th Cir. 2004) ("Here, a false condemnation could hurt the very interest the antitrust laws seek to protect—consumer welfare.").

142 K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995) (quoting Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560, 1571 (11th Cir. 1983)); *see also* Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 63 (2d Cir. 1997) ("[T]he Sherman Act's essential purpose [is] safeguarding consumer welfare.").

143 Augusta News Co. v. Hudson News Co., 269 F.3d 41, 47 (1st Cir. 2001).

144 LePage's, Inc. v. 3M, 324 F.3d 141, 163 (3d Cir. 2003) (en banc) (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994)).

145 *Rebel Oil* defines "consumer welfare" as allocative efficiency. 51 F.3d at 1444 n.15 ("[A]llocative efficiency is synonymous with consumer welfare and is the central goal of the Sherman Act." (citation omitted)). *Rebel Oil* also states that "an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises prices of goods above competitive levels or diminishes their quality." *Id.* at 1433. This comment implies that a Sherman Act plaintiff must show harm to allocative efficiency as well as harm to consumers. It is not clear, however, that the Ninth Circuit would preclude liability in situations in which consumers were hurt but allocative efficiency was not. The court did not discuss instances in which the two values conflicted and never said it would condone a practice that injured consumers in the relevant market if the practice enhanced allocative efficiency. In the event of a conflict, therefore, the Ninth Circuit may not actually assign preeminence to allocative efficiency. Indeed, in *MetroNet*, discussed below, the Ninth Circuit distinguished consumer welfare from allocative efficiency and treated consumer welfare as the superior value. 383 F.3d at 1136.

146 *See* Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 402 (E.D.N.Y. 2007) ("'[T]he antitrust laws are not intended to protect profit margins but consumer welfare.'" (quoting Feldman v. Health Care Serv. Corp., 562 F. Supp.

give equal recognition to consumer impact, suggesting that judges see antitrust law as promoting both consumer well-being and economic efficiency at the same time.[147] These opinions do not indicate that if

941, 950 (N.D. Ill. 1982))); Cohlmia v. Ardent Health Servs., L.L.C., 448 F. Supp. 2d 1253, 1263 (N.D. Okla. 2006) ("'[T]he purpose of antitrust law is the promotion of consumer welfare.'" (quoting Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1015 (S.D. Tex. 1997))); Mumford v. GNC Franchising L.L.C., 437 F. Supp. 2d 344, 354 (W.D. Pa. 2006) ("Congress designed the Sherman Act, after all, to protect consumer welfare by protecting competition itself, not particular competitors."); Golden Bridge Tech., Inc. v. Nokia, Inc., 416 F. Supp. 2d 525, 529 (E.D. Tex. 2006) ("Under the rule of reason analysis a plaintiff must 'show that the defendants' actions amounted to a conspiracy against the market—a concerted attempt to reduce output and drive up prices or otherwise reduce consumer welfare.'" (quoting Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292–93 (5th Cir. 1988))); Davray, Inc. v. City of Midlothian, No. Civ. A3:04-CV-0539-B, 2005 WL 1586574, at *13 (N.D. Tex. July 6, 2005) (same); Ramallo Bros. Printing, Inc. v. El Dia, Inc., 392 F. Supp. 2d 118, 129 (D.P.R. 2005) ("[C]onsumer welfare is the primary concern of the antitrust laws."); Abraham v. Intermountain Health Care, Inc., 394 F. Supp. 2d 1312, 1326 (D. Utah 2005) ("'[W]e must bear in mind that the purpose of the antitrust laws is the promotion of consumer welfare. . . .'" (quoting Reazin v. Blue Cross & Blue Shield of Kansas, 899 F.2d 951, 960 (10th Cir. 1990))); SmithKline Beecham Corp. v. Apotex Corp., 383 F. Supp. 2d 686, 697 (E.D. Pa. 2004) ("'The fundamental policy underlying the law, of course, is that competition benefits consumer welfare. Here, from the consumer perspective, the critical fact is that a generic drug reached the marketplace, thereby enhancing consumer choice.'" (quoting Eon Labs Mfg., Inc. v. Watson Pharm., Inc., 164 F. Supp. 2d 350, 358 (S.D.N.Y. 2001))); Dooley v. Crab Boat Owners Ass'n, 2004-1 Trade Cas. (CCH) ¶ 74,421 (N.D. Cal. Apr. 26, 2004) ("While competition among rivals does not violate the Sherman Act, a reduction of competition which harms consumer welfare does contravene the Act."); United States v. UPM-Kymmene Oyj, 2003-2 Trade Cas. (CCH) ¶ 74, 101 (N.D. Ill. July 25, 2003) ("Consumers of the products will be damaged by paying more than they otherwise would pay [if the merger is allowed]. . . . The intended purpose of federal antitrust laws is to be a consumer welfare prescription." (internal quotation marks omitted)); United States v. Visa USA, Inc., 163 F. Supp. 2d 322, 406 (S.D.N.Y. 2001) (noting that "[s]ince defendants' exclusionary rules undeniably reduce output and harm consumer welfare," and since defendants have not shown procompetitive justifications, the rules violate the Sherman Act), *aff'd*, 344 F.3d 229 (2d Cir. 2003); *In re* Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 364 (D.N.J. 2001) ("Where, as here, it is alleged that consumers paid a price higher than the price that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted."); Danielson Food Prods. v. Poly-Clip Sys., 120 F. Supp. 2d 1142, 1143 (N.D. Ill. 2000) ("[T]he overarching standard, as the courts interpret it today, is whether the defendants' actions diminish competition and injure consumer welfare."); Chase v. Nw. Airlines Corp., 49 F. Supp. 2d 553, 569 (E.D. Mich. 1999) (arguing that restraint on intrabrand competition may violate Section 2 of the Sherman Act because "intrabrand competition may provide the only significant source of consumer welfare in the relevant market").

147 *See* E. Portland Imaging Ctr., P.C. v. Providence Health System-Oregon, 2006-1 Trade Cas. (CCH) ¶ 75,197 (D. Or. Mar. 21, 2006) ("An act is deemed anticompetitive under the Sherman Act 'only when it harms *both* allocative efficiency *and* raises

there were a conflict between the two goals, courts should sacrifice the interests of consumers in the relevant market in order to improve the efficiency of the economy. As we show in the next section, that has also been true of courts deciding the types of cases where such a conflict might arise. For the last fifteen years, if not more, courts have never taken the position that economic efficiency should trump consumer well-being.

3. Conflicts Resolved in Favor of Consumers, Not Efficiency

In at least two types of cases—horizontal mergers and practices that facilitate price discrimination—a conflict could arise between economic efficiency and the welfare of consumers.[148] In merger cases, the courts have addressed this conflict directly and ruled without exception that consumer well-being is the preeminent value. As a result, increases in productive efficiency have mattered in merger analysis only to the extent they were likely to be passed on to consumers in the relevant market. In the second type of case (involving practices that facilitate price discrimination), courts have not addressed the issue directly, but statements in two decisions suggest they were unwilling to promote economic efficiency at the expense of consumer interests.

a. Horizontal Mergers

A merger of competitors can increase economic efficiency even though it reduces consumer welfare. If the merger is likely to generate both cost savings and greater market power, the increase in productive efficiency can outweigh the loss in allocative efficiency, causing a net gain in overall efficiency, even though consumers in the relevant market are hurt because they have to pay higher prices.[149]

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the prices of goods above competitive levels or diminishes their quality.'" (first emphasis added) (quoting *Rebel Oil Co.*, 51 F.3d at 1433)); *In re* NCAA 1-A Walk-on Football Players Litig., 398 F. Supp. 2d 1144, 1151 (W.D. Wash. 2005) ("Generally, the test for harm to competition is whether consumer welfare has been harmed such that there has been a decrease in allocative efficiency and an increase in price.").

148 While these are not the only areas in which a conflict might arise, *see* Baker, *supra* note 30, at 517–18, we have not found any decisions addressing the conflict in other areas, with one exception. In *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984), a buy-side case discussed in subpart B below, then-Judge Breyer declared that even if the defendant's conduct reduced allocative efficiency, courts should be reluctant to condemn it because it appeared to benefit consumers. *Id.* at 930–31.

149 For the classic demonstration of this proposition, see Oliver E. Williamson, *Economies As an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

No court in the United States, however, has ever allowed a merger that was likely to increase prices in the relevant market (or otherwise deprive consumers of the choices a competitive market would provide) on the ground that it was likely to enhance economic efficiency. To the contrary, the courts have uniformly insisted that merging parties cannot establish an efficiencies defense unless they show both that the merger would generate significant cost savings and that enough of those savings would be passed on to consumers that consumers would benefit from (or at least not be hurt by) the merger.

Numerous decisions over the last fifteen years have adopted such a consumer benefit standard. In *FTC v. H.J. Heinz Co.*,[150] the D.C. Circuit stated that a "'defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.'"[151] In *FTC v. Swedish Match*,[152] Judge Hogan held that the defendants' efficiency evidence was insufficient to overcome the presumption of illegality because the defendants had not shown what proportion of their cost savings they would pass on and "how that will defeat the likely price increases in this market."[153] Likewise, in *FTC v. Libbey, Inc.*,[154] the district court ruled that although the defendants' efficiencies evidence "demonstrates that there could potentially be some positive results of the acquisition," it did not "outweigh the potential harm to the market" from higher prices.[155] In particular, the defendants had not shown "why Libbey will not use this opportunity to raise its own prices."[156] In *United States v. Long Island Jewish Medical Center*,[157] the court stated:

Williamson also shows that in many circumstances, economic efficiency would increase even though the merger would impose a relatively large price increase and produce relatively small cost savings. This occurs because what counts in efficiency analysis is the deadweight loss, not the transfer of wealth from consumers to the merged firm. For analyses of this tradeoff that determine how large efficiencies must be to prevent prices from rising to consumers, see Fisher et al., *Afterword*, *supra* note 58, at 1702–06; Fisher & Lande, *supra* note 58, at 1670–77; Fisher et al., *Horizontal Mergers*, *supra* note 58, at 797–810.

150 246 F.3d 708 (D.C. Cir. 2001).

151 *Id.* at 720 (quoting FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991)).

152 131 F. Supp. 2d 151 (D.D.C. 2000).

153 *Id.* at 172.

154 211 F. Supp. 2d 34 (D.D.C. 2002).

155 *Id.* at 53.

156 *Id.*

157 983 F. Supp. 121 (E.D.N.Y. 1997).

"[W]ith regard to the so-called 'efficiencies defense,' the defendants must clearly demonstrate that the proposed merger itself will, in fact, create a net economic benefit for the health care consumer."[158]

All these decisions stand for the proposition that "an acquisition that lowers costs may still be unlawful 'if it results in an increased likelihood of higher prices.'"[159] Other cases concur,[160] and there is no decision to the contrary. The merger cases to date, therefore, have uniformly applied a consumer impact standard, rather than a total welfare standard, to the evaluation of claimed efficiencies.[161]

In some of these cases, moreover, this position was not simply dictum. The court found actual or potential merger-specific efficiencies but disregarded some or all of those cost savings because they were unlikely to be passed on to consumers. In *FTC v. Staples, Inc.*,[162] the defendants asserted that the challenged transaction would produce a variety of efficiencies, including better prices from vendors and reduced distribution costs.[163] Although Judge Hogan identified numerous flaws in this defense, he did not conclude that the merger would generate no significant efficiencies. To the contrary, he stated that "the Court believes that there would be some efficiencies realized

158 *Id.* at 147.

159 Dr. Pepper/Seven-Up Cos. v. FTC, 798 F. Supp. 762, 777 (D.D.C. 1992) (quoting Administrative Record at 233, *Dr. Pepper*, 798 F. Supp. 762 (No. 1:91cv02712)), *rev'd on other grounds*, 991 F.2d 859 (D.C. Cir. 1993).

160 *See, e.g.*, FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 153 (D.D.C. 2004) ("The existence of such efficiencies . . . remains relevant to an assessment of the . . . potential benefits to consumers from cost reductions and increased competition."); United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000) ("Defendants have not made the necessary showing that efficiencies would result *and* that they would lead to benefits for consumers in the relevant market."); FTC v. Tenet Healthcare Corp., 17 F. Supp. 2d 937, 948 (E.D. Mo. 1998) ("[M]any of the projected efficiencies would not benefit Poplar Bluff consumers."), *rev'd*, 186 F.3d 1045 (8th Cir. 1999); FTC v. Staples, Inc., 970 F. Supp. 1066, 1090 (D.D.C. 1997) ("[D]efendants' projected pass through rate—the amount of the projected savings that the combined company expects to pass on to customers in the form of lower prices—is unrealistic."); FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1301 (W.D. Mich. 1996) (positing that acquisition would yield substantial cost savings "that would, in view of defendants' nonprofit status and the Community Commitment, invariably be passed on to consumers"), *aff'd*, 121 F.3d 708 (6th Cir. 1997).

161 Professors Gifford and Kudrle observe that "[m]any courts have indicated that some of the merger-generated cost savings must be passed on to consumers, thus suggesting a consumer-surplus approach to the evaluation of efficiency." Gifford & Kudrle, *supra* note 30, at 447 n.83. They conclude that American merger case law "appears to equate the 'consumer welfare' goal of antitrust law with the use of a consumer surplus standard," not a total surplus standard. *Id.* at 446.

162 970 F. Supp. 1066 (D.D.C. 1997).

163 *See id.* at 1089–90.

by the merger."[164] He ruled that these savings did not excuse the transaction, however, because most of them would not be passed on,[165] and thus consumers in the relevant markets would likely pay higher rather than lower prices after the merger.[166] Likewise, in *Dr. Pepper/Seven-Up* the district court found that the acquisition was likely to yield significant efficiencies.[167] These cost reductions did not save the acquisition, though, because there was considerable evidence that the acquisition would increase prices in the relevant market.[168] In *Libbey*, the court was also unwilling to conclude that the merger would generate no efficiencies.[169] It disregarded the potential for cost savings, however, because the defendants had failed to explain why the merger would not lead to higher prices.[170]

The approach in these cases is inconsistent with a total welfare standard. Instead of calculating the impact of the transaction on producers' surplus and consumers' surplus and comparing the two magnitudes, the courts simply asked whether the transaction would benefit consumers in the relevant market. While this means that no case actually *found* that a merger would increase economic efficiency, there is no evidence that these judges would have elevated total welfare over the welfare of consumers had they found an increase in total welfare.[171]

164 *Id.* at 1092.

165 *Id.* at 1090 ("[T]he Court also finds that the defendants' projected pass through rate . . . is unrealistic. . . . [T]he defendants have projected a pass through rate of two-thirds of the savings while the evidence shows that, historically, Staples has passed through only 15–17%.").

166 *Id.* at 1091 ("Without an injunction, consumers in the 42 geographic markets where superstore competition would be eliminated or significantly reduced face the prospect of higher prices than they would have absent the merger.").

167 Dr. Pepper/Seven-Up Cos. v. FTC, 798 F. Supp. 762, 777 (D.D.C. 1992) (finding "merit in plaintiffs' argument" that the acquisition "would create cost efficiencies in the distribution and marketing of Seven-Up products in the New York metropolitan market").

168 *Id.* (finding that an acquisition is unlawful, despite its cost savings, if it would result in higher prices and that there was "ample evidence in the record from which the Commission could rationally conclude that such an outcome was likely").

169 FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 53 (D.D.C. 2002).

170 *Id.* ("Although the evidence presented by the defendants demonstrates that there could potentially be some positive results of the acquisition, the Court does not believe that these results outweigh the potential harm to the market that could result given the fact that there has not been sufficient evidence to establish . . . why Libbey will not use this opportunity to raise its own prices.").

171 None of these decisions considered Professor Baker's limited exception to a consumer impact standard. *See* Baker, *supra* note 30, at 520 n.137 ("[A]ntitrust should seek to protect consumers except when the aggregate efficiency costs of doing so would be large."). In contrast, Canada allowed the merger of Superior Propane

b. Practices That Facilitate Price Discrimination

A conflict between economic efficiency and consumer well-being may also arise when the challenged practice facilitates price discrimination. The conflict arises because a monopolist that initially charges a single monopoly price may be able to increase both its profits and economic efficiency by engaging in price discrimination. Indeed, if the monopolist could practice perfect (or first-degree) price discrimination, it would maximize allocative efficiency, since by charging each one of its customers its reservation price, the monopolist would increase its sales from the monopoly level to the perfectly competitive level. Such a move would reduce the welfare of consumers, however, because it would completely eliminate consumers' surplus and magnify the transfer of wealth from consumers to the monopolist. Thus, if a firm with monopoly power uses a tying arrangement to achieve first-degree price discrimination, the tie would be desirable on efficiency grounds but harmful to consumers.[172]

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and ICG Propane, even though it would harm consumers, because it would produce a substantial increase in total welfare. Specifically, the Canadian Competition Tribunal found that the transaction would result in a significant price increase and a wealth transfer of approximately $40.5 million a year. *See* Comm'r of Competition v. Superior Propane, Inc., [2003] 3 F.C. 529, ¶ 22 (Can.). The Tribunal also concluded, however, that it would pass a total surplus test, even if the surplus were reduced to reflect the merger's adverse effects on low income consumers. The Federal Court of Appeal sustained this conclusion, upholding the following findings of the Tribunal: (a) the merger would generate efficiency gains of $29.2 million a year, *id.* ¶ 15; (b) the deadweight loss from the price increase and an expected reduction in services offered would not exceed $6 million a year, *id.*; (c) the only portion of the wealth transfer that should be included was the transfer from "low income households that used propane for essential purposes and had no good alternatives," a transfer of just $2.6 million a year, *id.* ¶ 24; and (d) even if this transfer was doubled—the highest reasonable weight that could be assigned—the total anticompetitive effects of the merger would not exceed $11.2 million ($6 million in deadweight loss plus $5.2 million in weighted wealth transfer), an amount that was less then the merger's efficiency gains. *Id.* ¶ 25. For a more in depth analysis of this case, see Fisher et al., *supra* note 31.

172 *See, e.g.*, Gifford & Kudrle, *supra* note 30, at 432 n.32 ("The use of tying arrangements . . . to effect first-degree price discrimination would be treated as lawful under a total surplus standard but as unlawful under a consumer surplus standard."); *accord* Baker, *supra* note 30, at 518 n.128; Warren S. Grimes & Lawrence A. Sullivan, Illinois Tool Works, Inc. v. Independent Ink, Inc.*: Requirements Tie-Ins and Intellectual Property*, 13 SW. J.L. & TRADE AM. 335, 347–49 (2007). Professor Areeda addressed a similar situation—a perfectly discriminating cartel—and recognized that it maximized efficiency, but he had no doubt that it reduced consumer welfare:

> The perfectly discriminating cartel is taking from some people and giving to other people more than competition would. I regard this as an anticompetitive distortion. "Consumer welfare" embraces what individual consumers are

Even if a tying arrangement does not achieve first-degree price discrimination, it may present a tradeoff between the welfare of consumers and economic efficiency, since it may increase total surplus but reduce consumers' surplus.[173] The only relatively recent case that touches on this conflict is *Jefferson Parish Hospital District No. 2 v. Hyde.*[174] In that case, after noting that a tying arrangement can facilitate price discrimination,[175] the Supreme Court stated that such discrimination "can increase the social costs of market power by . . . increasing monopoly profits over what they would be absent the tie."[176] By characterizing an increase in monopoly profits as a "social cost," the Court was endorsing a consumer-oriented view of antitrust law, since an increase in monopoly profits represents a cost to consumers but may not represent a loss in economic efficiency. To the contrary, the discrimination may enhance efficiency. The Court did not note this possibility, however, or even mention economic efficiency. Instead, the Court referred to "the consumer—whose interests the statute was especially intended to serve."[177] *Jefferson Parish* suggests, therefore, that if a tying arrangement facilitates price discrimination, it would be undesirable if it harms consumers in the relevant market, even if it increases efficiency.[178]

More recently, the Ninth Circuit considered another practice that facilitated price discrimination and evaluated it primarily, if not exclu-

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> entitled to expect from a competitive economy. If the efficiency extremists insist that only their definition of consumer welfare is recognized by economists, we would answer that ours is clearly recognized by the statutes. The legislative history of the Sherman Act is not clear on much, but it is clear on this.

Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983).

173 William F. Baxter & Daniel P. Kessler, *Toward a Consistent Theory of the Welfare Analysis of Agreements*, 47 STAN. L. REV. 615, 623–24 (1995).

174 466 U.S. 2 (1984).

175 *Id.* at 15 n.23 (explaining that "[s]ales of the tied item can be used to measure demand for the tying item," forcing "purchasers with greater needs for the tied item" to "in effect . . . pay a higher price to obtain the tying item," while purchasers with lesser needs for the tied item in effect pay a lower price for the tying item).

176 *Id.* at 14–15.

177 *Id.* at 15. Justice O'Connor's concurring opinion also used language that evokes a consumer protection approach to antitrust. She noted that market power in the tying product may result in "exploitation of consumers." *Id.* at 35 (O'Connor, J., concurring).

178 *See id.* at 12–16 (majority opinion); *see also* Gifford & Kudrle, *supra* note 30, at 432 n.32 ("An old Supreme Court decision that dealt with [the price discrimination] issue took the route indicated by the consumer surplus standard." (citing IBM Corp. v. United States, 298 U.S. 131 (1936))).

sively, in terms of consumer impact.[179] In *MetroNet,* the challenged practice facilitated price discrimination because it prevented the plaintiff, a reseller of the defendant's services, from engaging in arbitrage and undermining the defendant's discriminatory pricing structure.[180] In upholding the practice, the court noted: "Prohibiting a seller from eliminating arbitrage can diminish consumer welfare and allocative efficiency in the long run under some circumstances."[181] Although the court referred to both allocative efficiency and consumer welfare, it never considered instances in which the elimination of arbitrage would harm consumers but increase efficiency. Rather, in every example the court considered, the elimination of arbitrage would have the same impact on both the welfare of consumers and allocative efficiency. Nothing in the Ninth Circuit's opinion suggests, therefore, that a positive impact on efficiency would outweigh a negative impact on consumer well-being. In addition, the court sometimes evaluated the desirability of preventing arbitrage by examining consumer welfare alone. The court stated, for example, that if a seller could not prevent arbitrage:

> [T]he seller might choose not to offer a discounted price in the first place and instead charge a uniform price to all consumers. If the uniform price it would set is as high as the price the seller would have charged the disfavored consumers if price discrimination could be maintained, consumer welfare would diminish.[182]

Moreover, the court summed up its analysis by stating: "Here, a false condemnation could hurt the very interest the antitrust laws seek to protect—consumer welfare."[183] Like *Jefferson Parish,* therefore, *MetroNet* suggests that the desirability of price discrimination depends on its impact on consumers, not efficiency.

179 *See* MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004).

180 *Id.*

181 *Id.* at 1136.

182 *Id.* In this example, the court concluded that consumer welfare would be diminished because the favored customers would no longer have the opportunity to purchase at a discounted price, while the disfavored customers would continue to purchase at a high price. The court measured consumer welfare, therefore, by price levels in the market, not by output, deadweight loss, or other components of allocative efficiency. When the court referred to the impact of arbitrage on both "consumer welfare and allocative efficiency," it also distinguished consumer welfare from allocative efficiency. *Id.*

183 *Id.*

4. Social Goals As Well As Consumer Welfare?

On one occasion, in *United States v. Brown University*,[184] the Third Circuit indicated that an allegedly anticompetitive agreement could not be fully evaluated without considering both its impact on consumers and its asserted "noneconomic justifications."[185] This unusual decision—the only one of its kind we found—arose because the Ivy League schools and the Massachusetts Institute of Technology (the Ivy Overlap Group) agreed that they would not compete for desirable students by offering them better financial aid packages. Instead, the colleges pledged they would only offer financial aid on the basis of need and would assess the need of each prospective student in the same way.[186] By eliminating merit aid at the Overlap schools, the agreement raised the cost of attending those schools for students who would otherwise have received a merit scholarship. At the same time, the agreement lowered the cost of attendance for students from disadvantaged backgrounds, since the schools plowed much, if not all, of the money they saved from not giving merit aid into larger scholarships for needy students.[187] Because the agreement eliminated price competition among the Overlap schools—a scholarship is in effect a reduction in tuition price—the district court concluded that only a "quick look" was necessary to condemn it.[188] The Third Circuit decided, however, that a more extensive analysis was required.[189]

In describing the scope of this analysis, the court never indicated that its ultimate aim was to determine whether the Overlap agreement enhanced economic efficiency. To the contrary, as the court noted more than once, the primary purpose of the Sherman Act is to benefit consumers.[190] On remand, therefore, the Third Circuit instructed the district court that it had to consider more fully two of the "pro-con-

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184 5 F.3d 658 (3d Cir. 1993).

185 *Id.* at 678.

186 *Id.* at 662–63.

187 MIT asserted that it did not make any money from the agreement. *See id.* at 664. The case focuses on MIT because all the other members of the Overlap Group signed consents immediately after the complaint was filed. Only MIT chose to litigate. *Id.* at 662 n.1.

188 *See id.* at 664–65.

189 *See id.* at 678.

190 The court first made this point in the course of rejecting the colleges' argument that they were exempt from the Sherman Act because they were nonprofit organizations. The court stated: "Nonprofit organizations are not beyond the purview of the Sherman Act, because the absence of profit is no guarantee that an entity will act in the best interest of consumers." *Id.* at 665. The court later added: "Enhancement of consumer choice is a traditional objective of the antitrust laws . . . ." *Id.* at 675.

sumer"[191] justifications MIT asserted: (1) by increasing socio-economic diversity at each school, the agreement improved the quality of the school's education, enhancing its "consumer appeal;"[192] and (2) by increasing the amount of financial aid extended to needy students, the agreement enabled some students to attend Overlap schools who could not otherwise have enrolled, "widening consumer choice."[193]

Evaluating these claimed consumer benefits, however, would not be enough to determine whether the agreement was permissible. According to the Third Circuit, the district court also had to consider the "noneconomic justifications proffered by MIT,"[194] in particular, its claim that the agreement increased "educational access and opportunity"[195] for poor and minority students. The Third Circuit ruled that access and opportunity were elements of "social welfare"[196] because Congress had, for more than twenty-five years, created and funded "programs that distribute financial aid exclusively on the basis of need."[197] The court never explained, though, why Congress wanted these important social goals to play a role in Sherman Act analysis beyond the role already played by consumer welfare. If the Overlap agreement benefited consumers because it raised product quality and expanded consumer choice, there was no need to consider its noneconomic justifications. If, however, the agreement made consumers as a whole worse off, what aspect of the language or legislative history of the Sherman Act would authorize the court to uphold it? The court cited none.

The issue was critical because the elite schools had decided to promote access and opportunity by transferring wealth from some consumers to others: the agreement took money from very talented students who would otherwise have received merit aid and gave it to needy students who could not otherwise have afforded an Overlap education. While the agreement expanded the choices of poor and minority students, it restricted the choices of other students. Although such a forced transfer of wealth might be desirable social policy, Congress could have achieved it by altering the tax code. Here, however, a group of elite colleges reduced competition among themselves in order to impose the transfer on consumers. The court

191 *Id.* at 678.
192 *Id.* at 674.
193 *Id.* at 675.
194 *Id.* at 678.
195 *Id.*
196 *Id.* at 675.
197 *Id.*

did not explain why Congress intended to exempt such a private restraint from the Sherman Act.

Brown appears, then, to have departed from the central mission of antitrust: it relied on social goals rather than consumer protection and it allowed competition to be suppressed in order to benefit some consumers over others. Despite these flaws, the implications of the decision are narrow. First, the social values the court considered are closely linked to consumer protection. The court wanted to promote educational access and opportunity in order to advance the well-being of certain consumers—poor and minority students who would not otherwise be able to obtain an Overlap education.[198] While the court was less concerned about the welfare of other consumers, the court's interest in helping disadvantaged consumers was plain. Second, in order to justify its use of social goals, the court invoked the federal need-based financial aid statutes.[199] These laws have no relevance to most Sherman Act decisions.

B. The Sharply Limited Concern for Small Business: Protecting Input Suppliers from Exploitation[200]

When a case involves restrictions on competition for inputs—and no danger to downstream consumers—courts focus on protecting input suppliers from exploitation, not consumers. This focus is entirely understandable. Suppose the only two pipelines serving a natural gas field merge and then lower the prices they offer gas suppliers with wells in this field. As indicated in Part II, this merger should be illegal even if it had no discernible adverse effect on gas consumers.[201]

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198 *Id.* at 678.

199 *Id.* at 675.

200 As we explained above, *supra* note 82, we do not discuss case law under the Robinson-Patman Act. This subpart addresses cases under the other antitrust laws in which the challenged conduct may harm input suppliers, who are often small businesses.

201 This example is derived from *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1307–08 (5th Cir. 1971). The merger might have no measurable effect on downstream consumers if the pipelines deliver their gas to a distribution point that is served by other pipelines. If the merged pipelines had a trivial share in this downstream market, their output decisions would not have a material impact on the market price.

If there is perfect price discrimination by the merged firm, output will not fall and no allocative inefficiency will be created. In this case the price discrimination could be condemned under a wealth transfer approach, but not on efficiency grounds. *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 550–52 & 552 n.6 (1969). However, if the merged firm does not engage in perfect price discrimination, the lower amount of natural gas produced in this field will

It would create market power on the buying side (monopsony power); it would deny the gas suppliers the benefits of a competitive market; and it would transfer wealth from the suppliers to the pipelines. As a result, most courts would condemn the merger—and the resulting exploitation of gas suppliers—even if gas consumers were not hurt. In *Telecor Communications, Inc.*,[202] for example, the Tenth Circuit stated: "The Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users."[203] Likewise, in *Weyerhaeuser* the Court required predatory bidding plaintiffs to show an adverse impact on suppliers, not consumers.[204]

This concern with the welfare of suppliers in buy-side cases is not, however, a significant departure from the concern with the welfare of consumers in the rest of antitrust law. First, buy-side cases are relatively rare in antitrust.[205] Historically, most antitrust enforcement has been directed at anticompetitive behavior by sellers, not buyers.[206] Second, the courts' focus on supplier interests in buy-side cases is simply the mirror image of their focus on consumer interests in sell-side cases. Just as Congress wanted to prevent sellers from using unfair means to acquire monopoly power (because they could then raise output prices and transfer wealth from consumers to themselves), Congress wanted to prevent buyers from using unfair means to acquire monopsony power (because they could then lower input prices and transfer wealth from suppliers to themselves).[207] The desire to stop the transfer of wealth by firms who had unfairly gained power is the

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instead be produced somewhere else, where its production will be relatively less efficient. Thus, imperfect price discrimination by a buyer sometimes can be condemned on efficiency grounds. *See* Michael L. Katz, *An Analysis of Cooperative Research and Development*, 4 RAND J. ECON. 527, 527 (1986).

202 Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124 (10th Cir. 2002).

203 *Id.* at 1133–34; *accord* White Mule Co. v. ATC Leasing Co., 540 F. Supp. 2d 869, 888 (N.D. Ohio 2008) (rejecting argument that suppliers are not protected by antitrust laws); *see also* Pease v. Jasper Wyman & Son, 845 A.2d 552, 555 (Me. 2004) (upholding antitrust damages awarded to blueberry growers); *infra* note 213 (citing additional cases).

204 In order to satisfy the second prong of the Court's test, a plaintiff must establish that the defendant's conduct created a dangerous probability of *monopsony* power, not monopoly power. *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1078 (2007).

205 *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY (1993) (collecting and analyzing the relatively small number of cases against buyers).

206 *See id.* at 1, 18–19; Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 ANTITRUST L.J. 505, 505 (2005).

207 *See Weyerhaeuser*, 127 S. Ct. at 1075–78 (observing the similarity between buy-side and sell-side cases).

same in both instances. So is the desire to preserve the benefits of competition for the other side of the market. The concern with supplier welfare in buy-side cases, in short, flows from the same legislative and normative roots as the concern with consumer welfare in sell-side cases.

Finally, in some buy-side cases courts have ruled that where powerful buyers extract concessions from suppliers and pass them on to consumers, the interests of consumers should prevail over the welfare of suppliers. In *Balmoral Cinema, Inc. v. Allied Artist Pictures Corp.*,[208] for example, the Sixth Circuit examined an agreement between competing distributors to refrain from bidding against each other for films. Although the agreement would likely harm film suppliers, the court refused to hold it per se illegal because it "may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare."[209] Likewise, in *Kartell v. Blue Shield of Massachusetts, Inc.*,[210] the First Circuit rejected an attack on Blue Shield's practice of capping the amounts that participating doctors could charge Blue Shield subscribers. While this practice may have resulted in payments to doctors that were *below* the competitive level,[211] the court was unwilling to condemn it. In explaining why, then-Judge Breyer emphasized that the practice seemed to benefit consumers:

> [T]he prices at issue here are low prices, not high prices. . . . [T]he Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low. . . . These facts suggest that courts at least should be cautious—reluctant to condemn too speedily—an arrangement that, on its face, appears to bring low price benefits to the consumer.[212]

To be sure, more recent decisions have disagreed, holding that anticompetitive practices by buyers cannot be justified by showing that the buyers passed on some of their gains to consumers.[213] If such

208 885 F.2d 313 (6th Cir. 1989).

209 *Id.* at 317.

210 749 F.2d 922 (1st Cir. 1984).

211 The court assumed, for the purpose of evaluating plaintiffs' case, that "Blue Shield possesses significant market power" and that "Blue Shield uses that power to obtain 'lower than competitive prices.'" *Id.* at 927.

212 *Id.* at 930–31. In *Kartell*, therefore, Judge Breyer indicated that a conflict between allocative efficiency and the welfare of consumers should be resolved in favor of consumers. If Blue Shield had paid physicians less than the competitive rate, as Judge Breyer was willing to assume, then Blue Shield's behavior reduced allocative efficiency. Yet Judge Breyer would not hold it illegal, in part because it brought "low price benefits to the consumer." *Id.* at 931.

213 In *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), the court rejected the defendants' attempt to justify an alleged buying cartel by claiming it

decisions are followed, the welfare of suppliers might in some cases take precedence over the welfare of consumers. Even then, however, the small business goal in antitrust law would be quite limited: it would apply only where suppliers have been exploited by the anticompetitive behavior of buyers, and only where consumers would not be forced to pay supracompetitive prices. Moreover, the focus of antitrust law would remain on protecting traders from exploitation, whether consumers or suppliers, not on increasing efficiency.[214] None of the buy-side decisions discussed in this section indicate that the overarching goal of antitrust law is economic efficiency.[215]

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would result in lower prices to consumers. The court stated that the public interest would be furthered by "free competition" among buyers. *Id.* at 988 (quoting Speegle v. Bd. of Fire Underwriters, 172 P.2d 867, 873 (Cal. 1946)). In *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998), the Tenth Circuit rebuffed the defendant's argument that its ceiling on the salaries Division I colleges could pay entry-level basketball coaches was a reasonable restraint because it lowered the costs of college basketball. The court declared that "cost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises." *Id.* at 1022. While the court stated that cost-cutting "by itself" is not valid defense, the court later asserted that lowering costs "arguably is beneficial to the members of the industry and ultimately their consumers." *Id.* at 1023 (quoting Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2643 (1996)). Like *Knevelbaard Dairies*, therefore, *Law* appears to have rejected a pass-on defense to buyer price fixing.

214 For a discussion of the importance of protecting small suppliers from exploitation, see Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563 (2005).

215 In his recent analysis of buy-side and other cases, *supra* note 47, Gregory Werden gets many things right. He correctly notes that "Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions." *Id.* at 714. He also recognizes that sellers should be protected from anticompetitive conduct by buyers whether or not the conduct "threatens the welfare of [the buyers'] customers or the welfare of end users." *Id.* at 735. Moreover, he concludes that "consumer welfare is the principal goal of the Sherman Act," *id.*, and that "the Sherman Act protects the competitive process in the expectation that doing so best protects consumer welfare over the long term," *id.* at 729. He is incorrect, however, when he says, "to the extent that the Court has taken seriously the proposition that the Sherman Act is a 'consumer welfare prescription,' it must have meant a broad welfare concept, such as aggregate welfare." *Id.* at 723. In recent years, as we have shown, both the Supreme Court and the lower courts have largely adopted the proposition that the ultimate objective of the antitrust laws in sell-side cases is to protect consumers in the relevant market, not to enhance aggregate welfare.

Werden's contrary conclusion rests on an incomplete analysis of recent case law. He does not mention the Court's willingness in *Brooke Group* to sacrifice allocative efficiency in order to achieve lower prices for consumers; the Court's articulation in *Leegin* of a one-to-one correspondence between effects on consumers and effects on

IV. The Desirability of Antitrust's Consumer Protection Mission

Not only is the wealth transfer approach the best explanation for both the antitrust laws' legislative histories and the case law, we believe it is also more desirable than the efficiency standard. The issue of which approach is most desirable is, of course, subjective. It is, moreover, irrelevant: what counts is congressional intent. Nevertheless, there certainly are reasons why antitrust is and should be concerned with protecting consumers from paying more because of illegally acquired market power.

First, it should not be surprising that voters in a democracy prefer an antitrust system that helps far more people than it hurts.[216] This is likely to be true even if there might be an efficiency-based system that would help a small group of people (owners of monopolies and cartels) in the aggregate more than the vast bulk of people were harmed.[217]

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competition; or the Court's distinct focus in both *Leegin* and *Weyerhaeuser* on consumer impact rather than efficiency. He also misses lower court statements that conduct cannot reduce competition or cause antitrust injury unless it threatens to harm consumers in the relevant market; the lower courts' failure to characterize productive efficiency as a goal of the antitrust laws, even though it is an essential component of aggregate welfare; the courts' unwillingness to say that either productive efficiency or allocative efficiency trumps consumer impact; and, most important, the courts' uniform refusal to consider the productive efficiencies of a merger unless they are likely to be passed on to consumers in the relevant market. Werden is correct that "[a]ctual adverse effects on consumer welfare never have to be proved; rather, it is sufficient that a restraint impairs the competitive process in a manner that makes harm to consumer welfare predictable." *Id.* at 736. But the "harm to consumer welfare" that must be predictable is harm to consumers in the relevant market, not harm to economic efficiency.

216 For an example of such a system, see Steven C. Salop, Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The *True* Consumer Welfare Standard 1 (Nov. 4, 2005) (unpublished manuscript), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/exclus_conduct_pdf/051104_Salop_mergers.pdf.

217 *See id.* at 1–2. For a thorough analysis of these and related issues that comes to a somewhat different position, see Baker, *supra* note 30. Professor Baker believes:

> The interpretation of antitrust law as a [political] bargain between consumer and producer interests . . . . [suggests that] antitrust enforcers and courts should seek to maximize aggregate surplus, subject to the constraint that consumers and producers sufficiently share the efficiency gains, at least on average . . . . [T]his perspective implies that antitrust law should be enforced today with a qualified emphasis on consumers: protecting consumers without regard to aggregate surplus unless the aggregate efficiency costs of doing so would be large.

Suppose two companies wanted to merge to a monopoly and this would cause prices to rise so that 10,000,000 consumers would each pay an additional $100, or $1 billion in total. Also suppose this merger would benefit the firms by $1.1 billion. Suppose that the $1.1 billion would go to the firm's stockholders, and that only a small minority of the supracompetitively priced product's consumers also held stock in either company.

Would this arrangement be efficient? Yes, by $100 million. Is the arrangement "fair" to the vast majority of the consumers who are not stockholders? The answer to this question depends upon who defines "fair," but suppose we put this issue to a vote? Wouldn't almost everyone vote, "Don't take my money just because taking $100 from me will gain the monopoly $110"?

Suppose the firms went to the consumers and said, "This merger will help us more than it will hurt you, so please allow us do it." The consumers, being good Coasians,[218] should respond: "So long as you give us back slightly more than we would lose, you can do it. We are willing to split the gain with you. If you pay us $105 we all will be happy and the most efficient allocation of resources will arise." Wouldn't most people think that the $105 payment would be "fair"?[219] How likely is it that consumers instead voluntarily would say, "I would lose $100 but you would gain $110, so go ahead and take my property without paying me anything at all"?

Each reader can judge for his or herself whether they would agree to this. Regardless, isn't it reasonable to suppose that the majority of people would prefer to keep their $100? For this reason the

Id. at 484–85. Many of the ideas in this argument were suggested to author Lande by Professor Stephen Ross.

Prof. Baker does not, however, discuss whether such a rule follows from the antitrust laws' legislative histories or would be administrable. Would it be as easy to predict, understand, or administer a rule that mergers should not be allowed to lead to higher consumer prices unless the resulting efficiency savings were "large," as it would be to predict, understand, or administer a rule that no merger should be allowed to lead to higher consumer prices?

218 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The Coase Theorem states that in the absence of transaction costs, the efficient allocation of property rights will result regardless who initially owns the right. If transaction costs are negligible, the parties can and will bargain over this right. As a result of this bargaining, the person willing to pay the most for the right will end up with it, and this will result in the most efficient allocation of resources. *See* Steven C. Salop, Note on the Coase Theorem 1 (unpublished manuscript, on file with author).

219 It also would be consistent with the Coase Theorem. *See* Salop, *supra* note 218, at 1.

passage of consumer-oriented antitrust laws seems quite logical for a democracy to do.

Second, isn't the efficiency view of antitrust another form of "trickle down economics"?[220] Doesn't the efficiency view embody the hope that if we allow businesses to take from consumers in the short run, then eventually, somehow, in some indirect, uncertain and difficult to explain long-run manner, the money will find its way back to society as a whole, including consumers, perhaps along with interest so that all told we will be better off overall?

Under this perspective the antitrust laws have a focus on the definite, the more observable and explainable, and often this means the short run. Perhaps in the short term we know that cartels and monopolies are "stealing" from consumers, but that maybe the resources really could be used better elsewhere in the economy in the long run. But no one knows what will actually happen in the long run, such as whether the public at large eventually will benefit, because the long run is much more uncertain. Can we be forgiven for being skeptical of the pleas of monopolies and cartels that being good to them in the short run will be desirable for society in the long run? Are we so certain of this that we should even let them "steal" from us in the short run?

In the long run economists remind us that we are all dead,[221] so can the citizens of a democracy be forgiven for asking them to skip the complicated arguments about long run resource allocation that might or might not prove to be true? This reason for enacting the antitrust laws is reminiscent of famous lines from the Rubáiyát of Omar Khayyám:

220 "Trickle down economics" advocates assisting businesses and the well-to-do in the short run in order to benefit all members of society in the long run. *See* William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1, 50 (2006); *see also* Daniel Seligman, *Tricklism*, FORTUNE, Nov. 16, 1992, at 199, 199 ("TDE [trickle down economics] has a long history. The MBA's Dictionary tells us the phrase was coined by Will Rogers, and Safire's Political Dictionary, produced by the eminent New York Times pundit, notes that it gained fame in the 1932 election, when Herbert Hoover was accused of believing in tricklism—'feeding the sparrows by feeding the horses.' A half-century later, the phrase had a leading role in the 1981 drama wherein David Stockman was taken to the woodshed by Ron for telling Washington Post editorialist William Greider that TDE was favored by the Reaganites.").

221 *See, e.g.*, JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923) ("[L]ong run is a misleading guide to current affairs. In the long run we are all dead.").

"Some for the Glories of This World, and some Sigh for the Prophet's Paradise to come; Ah, take the Cash, and let the Credit go, Nor heed the rumble of a distant Drum!"[222]

Perhaps the antitrust laws embody consumers' desires to keep their "cash" rather than to trust the "trickle down" economics of the efficiency view.

V. Implications

The antitrust laws reflect our desire for competition and competitive prices for everyone—buyers as well as sellers.[223] Abandoning the detour which has asserted that United States antitrust policy is only concerned with economic efficiency would be the most faithful way to carry out the intent of Congress. It also would be desirable for policy reasons, would be as easy to administer as the efficiency view,[224] and would make United States antitrust more consistent with the views of the European competition authorities.[225]

How much difference would it make if antitrust focused on consumer protection objectives instead of—or in addition to—economic efficiency? In most cases, it would make no difference. If no market power is created or enhanced by a business practice, there is no allocative inefficiency and no transfer of wealth from consumers to the firms in question.[226] In these circumstances it would not matter which approach were used. Conversely, most situations of antitrust concern

222 THE RUBÁIYÁT OF OMAR KHAYYÁM, Verse XIII, at 35 (Edward Fitzgerald trans., 1898).

223 While this Article has typically focused on the price and effects of anticompetitive conduct, sometimes consumer welfare cannot adequately be protected by antitrust enforcement that only considers price and such closely related areas as cost and quantity. The "consumer choice" approach is another, more complex way to articulate the goals of the antitrust laws in those situations when non-price issues are at stake. "Consumer choice" is an emerging paradigm that also is completely economic in nature. It does incorporate the wealth transfer effects of market power. It also differs from the efficiency model because it gives greater weight to short term non-price choices having to do with quality or variety, and also to long term innovation effects. *See* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007).

224 *See* Fisher & Lande, *supra* note 58, at 1684–91.

225 The European Competition Commission believes that protecting consumers from unfair transfers of wealth should be the primary concern of competition law and that a concern for enhanced economic efficiency should not be allowed to lead to higher consumer prices. *See* European Competition Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* 4, 17–18 (Dec. 2005), *available at* http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

226 *See* Baxter & Kessler, *supra* note 173, at 621.

(such as routine horizontal price fixing) give rise to both allocative inefficiency and a transfer of wealth from purchasers to the cartel.[227] Cartels, for example, would be condemned under either approach, and it does not matter very much why we condemn them.[228]

But there are some situations involving tradeoffs, and others that give rise to a wealth transfer but no economic inefficiency, where the choice among antitrust goals could make a significant difference. For example, some horizontal mergers that lead to both market power and cost savings would be handled differently under the efficiency and the consumer protection standards.[229] Essentially, the market power effects of the proposed transaction would be given more weight under an approach whose goal was to prevent consumers from paying higher prices as a result of the merger than they would be given under an approach that permitted higher consumer prices so long as the merger was, on balance, efficient.[230] The wealth transfer approach would result in stricter merger enforcement, although it is difficult to ascertain how many real-world cases would be affected.[231]

A similar tradeoff would arise in any complex potential rule of reason violation that involved both market power effects and cost savings.[232] For instance, suppose a joint venture gave rise to both cost savings and increased market power. As with the merger example, it would be treated more harshly under an approach that sought to prevent prices from rising.

As noted above, similar issues could arise in situations involving price discrimination. These issues may appear in Robinson-Patman Act cases, tying cases, and cases challenging discounts used to achieve exclusive dealing arrangements.[233] While price discrimination can be

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227 *See id.* at 621–26.

228 *See id.*

229 *See supra* note 149 and accompanying text.

230 *See* Fisher & Lande, *supra* note 58, at 1624–36, 1670–77.

231 *Id.*

232 For an analysis of many of the economic issues involved in these situations, see Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941, 949–84.

233 *See* Robert H. Lande, *Should Predatory Pricing Rules Immunize Exclusionary Discounts?*, 2006 Utah L. Rev. 863, 883; *see also* European Competition Commission, *supra* note 225, at 40 ("Another possible negative effect of rebate systems is price discrimination between the different buyers."); *id.* at 54 (referring to price discrimination as an anticompetitive effect of tying arrangements). Commissioner Kovacic provocatively notes: "It is conceivable that the evaluation of distribution practices would be influenced more deeply than merger enforcement if a wealth transfer standard gained acceptance." Kovacic, *supra* note 5, at 1463 n.234.

efficient or inefficient, depending on the circumstances,[234] it almost always causes significant wealth transfer effects.[235] To our knowledge, however, a rigorous analysis of the welfare effects of price discrimination—including consideration of its wealth transfer effects, an analysis that combined theory and empiricism so that the correct policy solution could be arrived at—has never been performed.[236] What would happen to conclusions about the empirical balance between the procompetitive and anticompetitive uses of price discrimination if its wealth transfer effects also were considered? Professor Hovenkamp observes: "All forms of persistent price discrimination transfer wealth away from consumers and toward sellers. If antitrust policy is concerned with such wealth transfers, then price discrimination presents an antitrust problem. The question is more complex if economic efficiency is not the exclusive goal of the federal antitrust laws."[237]

As this Article has demonstrated, economic efficiency is not the exclusive goal of the antitrust laws. Rather, Congress made clear that the fundamental goal is protecting consumers from exploitation. Congress' principal objective, in other words, was to prevent firms from acquiring or maintaining market power without justification and then using that power to raise prices to consumers. In mainstream antitrust law, there is only one goal in addition to protecting buyers. When small suppliers are threatened by anticompetitive behavior, Congress wanted to protect them from exploitation as well, so long as this could be accomplished without causing purchasers to pay supracompetitive prices. In both sell-side and buy-side cases, in short, the ultimate goal is the same—competitive prices (and other terms) for all. Congress wanted to achieve this goal, moreover, not because it would enhance economic efficiency, but because it would prevent powerful firms from unfairly extracting wealth from their trading partners.

Those who espouse the conventional wisdom have missed this basic distinction. They have confused the general tendency of anti-

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234 *See, e.g.*, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 576–78 (3d ed. 2005).

235 *Id.* at 576. In the case of perfect price discrimination, for example, allocative efficiency is not harmed but there may be a substantial transfer of wealth from consumers to the discriminating firm. *See supra* note 171 and accompanying text.

236 Another complexity arises from the fact that price discrimination may not entail only a transfer from consumers to the monopolist. Relative to a single-price regime, price discrimination could also transfer surplus from consumer group A (e.g., low-elasticity consumers, who pay a higher price) to consumer group B (e.g., high-elasticity consumers, who pay a lower price). Any analysis of the wealth transfer effects of price discrimination should also account for this type of effect.

237 HOVENKAMP, *supra* note 234, at 576; *accord* Kovacic, *supra* note 5, at 1463.

trust law—to promote efficiency—with its ultimate goal. While antitrust enforcement is governed by economic analysis and generally promotes economic efficiency, it sometimes confronts tradeoffs. Whenever a tradeoff must be made, neither Congress nor the courts have ever chosen efficiency over consumer protection. Instead, both Congress and the courts have indicated that the fundamental purpose of antitrust law is to protect consumers from exploitation.