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THE MODERNIZATION OF ANTITRUST: A NEW EQUILIBRIUM

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Antitrust law is in search of a new equilibrium. It is torn between claims that it should limit the power of large corporations and claims that it should increase the efficiency of American business. Regard for efficiency is in the ascendancy.

This Article examines the contention that the antitrust laws should be applied solely to promote efficiency and examines the often unarticulated definitions of efficiency. It addresses two questions: (1) How should efficiency, as it informs antitrust, be defined? and (2) What is the appropriate role of efficiency in antitrust policy and problem-solving?

The Article concludes that efficiency defined in terms of serving consumers' long-run interests and implemented by protecting the competition process is and should continue to be a major goal of antitrust, and that the basic socio-political values of antitrust other than smallness for its own sake coincide with efficiency as so conceived and should continue to guide antitrust policy. The Article proposes a formulation for achieving a new equilibrium designed to advance the efficiency goals and harmonize the non-efficiency goals.

I

Antitrust and Efficiency in Context

Three quite different questions bear on antitrust and efficiency. First, what factors and policies are instrumental in producing efficient performance of American business, and where does antitrust stand among these factors and policies? Second, what can and should be the relationship between antitrust law and efficiency? Finally, how efficient is antitrust enforcement, given stated policy goals?

This Article addresses the second question. It does not examine the efficiency of enforcement as such, but internalizes the premise that stability and continuity in the antitrust rule of law provides for greater

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certainty and therefore more effective deterrence, lower costs of litigation, and lower costs in business decisionmaking.

Although the Article is not concerned centrally with examining the factors and policies that produce efficient performances, that inquiry must be made in order to understand the place of antitrust in the business/performance universe. Antitrust law and enforcement is not the prime ingredient of the efficient performance of firms. Antitrust cannot compel business managers to make progressive decisions or to take the route that serves consumers best. Rather, antitrust law plays a role at two other points in the business/performance universe. First, the law may constrain firms from gaining or abusing market power, thereby conducing to greater responsiveness to consumers' wants. Second, antitrust may provide an environment that nurtures a system of checks, balances, and incentives, causing firms to compete to provide new, better, and lower cost means of satisfying consumers.

If the purpose of antitrust were solely to improve the performance of existing business firms in measurable ways, and if the antitrust laws were to be applied only to achieve provable efficiency gains, then antitrust law would require a searching reexamination and major overhaul, perhaps even repeal. It is a burden of this Article that the antitrust laws never had such a narrow mission or such a weighty charge.

II

The Forging of the Link Between Antitrust and Efficiency

Antitrust emerged from the 1960s as a philosophy and body of law reflecting American political democracy.[1] It favored dispersion

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[1] *See* Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships,* 68 Calif. L. Rev. 1 (1980). *See also* Brodley, *Limiting Conglomerate Mergers: The Need for Legislation,* 40 Ohio St. L.J. 867 (1979); Flynn, *Introduction, Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy,* 125 U. Pa. L. Rev. 1182 (1977); Fox, *Antitrust, Mergers, and the Supreme Court: The Politics of Section 7 of the Clayton Act,* 26 Mercer L. Rev. 389 (1975); L. Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises,* 128 U. Pa. L. Rev. 244 (1979); L. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust,* 127 U. Pa. L. Rev. 1076 (1979); L. Schwartz, *Institutional Size and Individnal Liberty: Authoritarian Aspects of Bigness,* 55 Nw. U.L. Rev. 4 (1960).

The Supreme Court summed up the interrelated political and economic values of antitrust legislation in Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958):

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest

of economic power[2] and easing of access to markets.[3] Faced with the choice between promoting cost-savings of firms with economic power and protecting freedom and opportunity of firms without economic power, the Supreme Court declared that the law favored the latter.[4] By attempting to preserve the competition system as a process, it sought to protect both business opportunity and the consumer.[5]

In general, neither Congress nor the Supreme Court envisioned sacrificing any one goal of antitrust for fuller realization of any other. The members of Congress and the members of the Court who spoke on the point generally assumed that the goals of antitrust were complementary.[6] In several decisions, however, the Supreme Court announced that it must honor the Congressional preference for decentralization of economic power, even if the law so applied occasionally would impose higher costs.[7]

If there ever existed an antitrust policy to protect a society of small business units in spite of possible costs to the consumer, that

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quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

[2] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) ("Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." (footnote omitted)).

[3] *See, e.g.*, Standard Oil Co. v. United States, 337 U.S. 293 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

[4] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Standard Oil Co. v. United States, 337 U.S. 293 (1949).

[5] Northern Pac. Ry. v. United States, 356 U.S. 1, 4-6 (1958); Associated Press v. United States, 326 U.S. 1, 15-18 (1945).

[6] *See* note 5 *supra*. *See also* J. DIRLAM & A. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 28 (1954); H. THORELLI, THE FEDERAL ANTITRUST POLICY ch. IV, at 134-265 (1955); Fox, *Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices*, in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM 142 (E. Fox & J. Halverson eds. 1979).

[7] *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 274-75 n.7 (1966) (Black, J.) (" 'Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.' " (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.))); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); Standard Oil Co. v. United States, 337 U.S. 293, 309 (1949); Fashion Originators' Guild of America v. FTC. 312 U.S. 457, 467 (1941) (Black, J.) ("[A] monopoly contrary to [the] policies [of the Sherman and Clayton Acts] can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold.").

Despite Supreme Court statements that antitrust enforcement may be appropriate even though it may impose costs on consumers, it is not clear that antitrust enforcement has in fact imposed costs on consumers. Statements from the cases cited above may be read as opposing a method of analysis that would require extensive cost-benefit calculations, while at the same policy has changed.[8] A new mood emerged in the nation in the late 1970s.[9] Influenced by rapidly accelerating inflation, lower productivity, an increasingly negative balance of payments, and dramatic advances by Japanese and German producers in world markets, the current national mood reflects a growing concern for productive efficiency.[10]

Meanwhile, antitrust has become both target and scapegoat. Critics condemn decisions as frustrating the achievement of efficiency.[11] They denounce the antitrust philosophy of the 1960s as populist[12] and protective of inefficient business.[13] They have been

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time supporting a process of competition that will probably benefit consumers over the long run.

[8] A shift in the course of antitrust followed changes in the composition of the Supreme Court. Chief Justice Warren, Justices Black, Harlan and Fortas, and later Justice Douglas, retired. President Nixon appointed Harry A. Blackmun, Warren E. Burger, William H. Rehnquist, and Lewis F. Powell, Jr. President Ford appointed John Paul Stevens. Zion, *A Decade of Constitutional Revision,* N.Y. Times, Nov. 11, 1979, § 6 (Magazine), at 26, col. 2. *See* Bock, *Antitrust and the Supreme Court—An Economic Exploration,* THE CONFERENCE BOARD, Info. Bull. No. 73 (1980).

Chief Justice Warren and Justices Black and Douglas were particularly prominent in their articulation of power-dispersion as the primary goal of antitrust. Chief Justice Warren wrote the opinion of the Court in Brown Shoe Co. v. United States, 370 U.S. 294 (1962), a merger case, which emphasizes the goal of deconcentration in spite of possible costs. Justice Black's opinions stress freedom, opportunity, and incentives for small business. *See, e.g.,* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Associated Press v. United States, 326 U.S. 1 (1945). Justice Douglas's opinions stress individualism and the need of human beings to control their own lives: "A nation of clerks is anathema to the American antitrust dream." United States v. Falstaff Brewing Corp., 410 U.S. 526, 543 (1973) (Douglas, J., concurring and dissenting).

[9] *See, e.g.,* Millstein, *Commission's Section 2 Reform Inappropriate Without More Study,* Nat'l L.J., Mar. 5, 1979, at 22, col. 1; Sims, *Antitrust Law is No Business Equal Opportunity Act,* Legal Times of Washington, Mar. 10, 1980, at 11, col. 1. *See also* Taber, *Capitalism: Is It Working . . . ?,* TIME, Apr. 21, 1980, at 40; SILK, *The Slowdown in Productivity,* N.Y. Times, Apr. 30, 1980, at D2, col. 1; Farnsworth, *Trade Combine Wins Support,* N.Y. Times, Apr. 7, 1980, at D2, col. 1.

[10] *See* note 9 *supra. See also* Weil, Kiers, *Putting Steel into America's Shares of World Markets* (separate articles under one title), N.Y. Times, Nov. 7, 1979, at A31, cols. 2, 5. *Cf.* Silk, *Interest Groups and Stagflation,* N.Y. Times, May 2, 1980, at D2, col. 1 (citing Professor Mancur Olson's thesis that business organizations tend to accumulate inefficiencies through demands imposed by labor unions and corporations on the economy, and their thesis that wartime destruction of the power of private organizations in West Germany and Japan broke the rigidities in those countries and opened the way to economic efficiency and growth). *See also* D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 212-15 (1978).

[11] L. THUROW, THE ZERO-SUM SOCIETY, ch. 6, at 145-53 (1980); Thurow, *Let's Abolish the Antitrust Laws,* N.Y. Times, Oct. 19, 1980, at F2, col. 3.

[12] A populist was, in historical terms, a member of the People's Party, which was formed in 1891 (the year after the Sherman Act was passed). The People's Party advocated, among other things, free coinage of silver, public ownership of railroads, and limitations on land ownership. The populists distrusted bigness and power elites—big business *and* big government. They supported reforms designed to increase the power and improve the lot of the plain people. G. MCKENNA, AMERICAN POPULISM xi-xxv, ch. II, at 85-151 (1974). The Farmer's Alliance, a forebear of the People's Party, flourished at the time of the passage of the Sherman Act. *Id.* It

did not advocate competition. Rather, it advocated government regulation in the form of controlling price and terms of entry. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 232-33 (1956). The term "Populist" is frequently used today with a negative connotation to mean one who wants to atomize big business. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW 22 (1976).

Those who denounce certain antitrust principles as populist set up a straw man. There is no discernible sentiment for pulverization of business. *See* Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947). See generally the articles and essays collected in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6.

Similarly, there is no discernible academic or public opinion in favor of using antitrust as a tool to redistribute wealth, other than to give consumers the benefit of a price near cost. Certain historical goals were distributive in the sense that the Congress that passed the Sherman Act was concerned that the trusts were profiteering at the expense of the ordinary person. *See* notes 36-39 and accompanying text *infra*. The legislators who spoke to the issue of wealth transfer expressed the view that the profiteering monopolist does not deserve monopoly gains. *Id.;* The Sherman Act Debates, 21 CONG. REC. 2461 (1890) (remarks of Sen. Sherman); *id.* at 2614 (remarks of Sen. Cooke); *id.* at 4098 (remarks of Sen. Wilson). *See* Standard Oil Co. v. United States, 221 U.S. 1, 82 (1911) (Harlan, J., concurring and dissenting). Although the treble damage action for an overcharge resulting from price-fixing has a distributive effect in favor of consumers, the Sherman Act cannot fairly be characterized as a tool to make poorer people richer.

Other distributive effects may be implied from the Clayton Act as originally passed in 1914, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-26 (1976), *as amended by* Pub. L. No. 96-349, § 6(a) (1980) (§ 7 of Clayton Act)) and the 1950 Celler-Kefauver Amendment to the Clayton Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (1976), as amended *supra)*. These statutes reflect an attempt to provide greater economic opportunity for entrepreneurs and businesses without market power. 51 CONG. REC. 9088 (1914) (remarks of Rep. Mitchell); *id.* at 14326 (remarks of Sen. Chilton); 96 CONG. REC. 16452 (1950) (remarks of Sen. Kefauver); *id.* at 16503-04 (remarks of Sen. Aiken); 95 CONG. REC. 11506 (1950) (remarks of Rep. Bennett). *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Standard Oil Co. v. United States, 337 U.S. 293 (1949); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941). Owners of businesses without market power are not necessarily poor, however, and owners of businesses with market power are not necessarily rich. Therefore, judicial implementation of the above legislative goals does not necessarily redistribute wealth from the richer to the poorer. Judicial implementation would tend to distribute business opportunities, and thus incentives, in favor of firms without market power. Thus, antitrust is a redistributor of wealth in only a modest sense.

[13] *See* R. BORK, THE ANTITRUST PARADOX (1978); R. POSNER, ANTITRUST LAW (1976); Millstein, *supra* note 9; Sims, *supra* note 9.

The "new" criticism of antitrust is, in fact, not new. *See, e.g.*, J. DIRLAM & A. KAHN, *supra* note 6. In chapter I, entitled *The New Criticism of Antitrust*, the authors, nearly 30 years ago, summarized the complaints "of business, especially big business," against antitrust:

> 1. Because the statutes are unclear or have been interpreted unpredictably, no businessman, however conscientious, is immune from prosecution.
>
> 2. Consequently, cases are selected mainly on a political basis.
>
> 3. Enforcement . . . has been by officials hostile to a free competitive system, and it has been carried out in a manner that makes vigorous competition more instead of less difficult for businessmen.
>
> 4. The antitrust laws have been interpreted in such a way as to protect small businesses from deserved competitive extinction; i.e., present interpretations confuse the preservation of competition with the preservation of competitors.
>
> 5. The government is attempting to substitute itself for the market in determining whether small or big business should do a particular job; the only appropriate judge is the consumer.
>
> 6. Businessmen should not be urged to compete, only to be turned against when they win out in the competitive struggle.

urging upon the courts an efficiency-based antitrust and have won some favor.[14] Proponents of one currently popular formula for the solution of all antitrust problems would examine challenged behavior to determine whether it is primarily output-restricting and therefore inconsistent with short-run aggregate consumer welfare as deduced from neo-classical price theory.[15] If so, the business activity would be condemned. If not, it would be encouraged.[16] This conception of antitrust would prohibit almost nothing at all. "Carried to its full logical rigor, as it has been by the Chicago School of economics, economic analysis keyed solely to 'efficiency' and 'consumer welfare'

> 7. Big business is necessary for military mobilization, efficiency, and technological progress.

Id. at 10-11.

[14] *See, e.g.,* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

The new advocates assert several doubtful contentions. They assert that selection of the efficiency-standard is apolitical, and that their proffered conceptions of efficiency are norm-free; that there is one efficient solution to competition problems, and that the efficient solution is discoverable; and that, apart from efficiency, there is no appropriate or workable touchstone for antitrust policy. 1 P. AREEDA & D. TURNER, *supra* note 12; R. BORK, *supra* note 13; R. POSNER, *supra* note 13. *But see* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication,* 8 HOFSTRA L. REV. 487 (1980).

Professors Areeda and Turner do not limit their approach to microeconomic analysis confined to output limitation, *supra* note 12. In this respect, they are to be distinguished from Professor Posner, who does, *supra* note 13, at 23. Areeda, Turner, and Posner are to be distinguished from Professor Bork who recognizes output theory but adds a healthy gloss in favor of freedom of business transactions or the status quo. R. BORK, *supra* note 13, ch. 4. *See* Gellhorn, Book Review, 92 HARV. L. REV. 1376, 1377 (1979) (reviewing R. BORK, THE ANTITRUST PARADOX). Professors Areeda and Turner, however, join Professors Posner and Bork in concluding that the efficiency principle makes antitrnst rational and that there is no other appropriate touchstone for antitrnst policy. 1 P. AREEDA & D. TURNER, *supra* note 12, ch. 1, at 3-33; R. BORK, *supra* note 13, ch. 3, at 72-89; R. POSNER, *supra* note 13.

[15] Neoclassical price-theory postulates that consumer welfare is maximized through output decisions that are constrained by competitive pressures that push price down to marginal cost (including a reasonable return on capital). Leading proponents of neoclassical price-theory maintain that the only significant obstacle to maximizing consumer welfare is cartelization; that is, agreements among competitors to limit production and raise price. *E.g.,* R. POSNER, *supra* note 13, at 23.

[16] *See* R. BORK, *supra* note 13, at 116-17. This is only one view, however, and a most conservative view, of the appropriate application of economics to antitrust. For recent Supreme Court language that looks in this direction, see Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979), in which Justice White, speaking for the Court, stated:

> [O]ur inquiry [in characterizing conduct under the per se rule] must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one desigued to "increase economic efficiency and render markets more, rather than less, competitive."

Id. at 19-20 (citations omitted).

Other opinions take a more open approach and look to the preservation of dynamic competition. *See, e.g.,* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (Stevens, J.).

has revealed with stark simplicity that there will be very little remaining of antitrust."[17]

III

The Goals of Antitrust

Proponents of the view that efficiency is the purpose of antitrust law claim support in the legislative history and in judicial interpretations of the antitrust statutes.[18] They imply that the efficiency goal is discovered and not chosen.[19] However, the selection of efficiency as the only appropriate touchstone of antitrust policy is not indicated by either the statutory language, which is ambiguous, or the legislative history, which is multivalued. Moreover, the case law that has developed over time does not, as Judge Wyzanski discerned, fit together as do pieces of a jigsaw puzzle.[20] The isolation of efficiency as the sole goal of antitrust requires a conscious rejection of equally dominant values that underlie the antitrust statutes.

This section explores the dominant values of antitrust as revealed by the two statutes commonly known as the federal antitrust laws: the Sherman Act[21] and the Clayton Act.[22] The importance of identifying these dominant values lies in the content they give or may give to the statutory words of proscription—namely, "in restraint of trade,"[23] "monopolize,"[24] and "may be substantially to lessen competition."[25]

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[17] Rowe, *New Directions in Competition and Industrial Organization Law in the United States*, in Enterprise Law of the 80's, at 177, 201 (Rowe, Jacobs & Joelson eds. 1980).

[18] *See* note 76 *infra*.

[19] 1 P. Areeda & D. Turner, *supra* note 12, at 23; R. Bork, *supra* note 13, at 79; R. Posner, *supra* note 13; R. Posner, Economic Analysis of Law 18 (2d ed. 1977).

[20] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[21] 15 U.S.C. §§ 1-7 (1976).

[22] *Id.* §§ 12-27 (1976), *as amended by* Pub. L. No. 96-349, § 6(a), 94 Stat. 1154 (1980).

This Article does not address the Robinson-Patman (Price-Discrimination) Act, 15 U.S.C. §§ 13-13b, 21a (1976), or the Federal Trade Commission Act, 15 U.S.C. §§ 41, 58 (1976), *as amended by* 94 Stat. 374 (1980).

[23] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

[24] Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1976).

[25] Section 7 of the Clayton Act, as amended by the Celler-Kefauver Amendment of 1950 and the Antitrust Improvements Act of 1980 provides:

> [N]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share

The Sherman Act, which is the oldest federal antitrust law, was adopted in 1890 during an age of revolutionary industrialization. Sprouting transportation networks brought into competition hundreds of firms that had enjoyed local monopolies. Prospects of expanding markets led to over-investment in productive facilities. Fierce and disabling competition ensued. Competitors responded by truce. They joined forces, usually in the form of trusts. They swallowed up hundreds of small proprietors and stamped out others. Farmers, shippers, and other suppliers and customers were, or so they believed, overcharged and underpaid.[26] The legislative history of the Sherman Act illuminates the congeries of concerns that gave birth to that statute, perhaps none so strong as the distrust of the perceived power of the giant trusts. Urging enactment of a law against the trusts, Senator Sherman spoke of the problems that agitate "the popular mind":[27] "[A]mong them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations."[28] Senator Sherman posited the case in which "combinations reduce prices . . . by better methods of production." Even such a combination would not be justified, Senator Sherman said, because "[the] saving of cost goes to the pockets of the producers."[29]

While Senator Sherman denounced the trusts as tyrants,[30] Senator Pugh observed that the trusts had the power to limit production and thereby increase price "oppressive[ly] and merciless[ly]."[31] Senator Vest observed that if you "create competition you then secure lower prices to the consumer."[32] Representative Mason addressed yet a different concern, "Even if the price of oil is reduced to one cent

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> capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1976), *as amended by* Pub. L. No. 96-349, § 6(a), 94 Stat. 1154 (1980).

[26] H. THORELLI, *supra* note 6, at 143-44. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962); Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

[27] 21 CONG. REC. 2460 (1890).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 2457. Representative Taylor spoke of "this monster [, the trust, which] robs the farmer on the one hand and the consumer on the other." *Id.* at 4098. Senator Heard referred to the beef trust as "this giant robber combination." *Id.* at 4101.

[31] *Id.* at 2558.

[32] *Id.* at 2466.

a barrel, it would not right the wrong done to the people by the trusts which have destroyed legitimate competition and driven honest men from legitimate business."[33]

The quoted statements well reflect the diverse concerns, as well as the rhetoric, that produced the Sherman Act. Members of Congress reflected the concern of the people with the perceived power and greed of the trusts, with the exploitation of those who dealt with the trusts, and with the demise of the small industrial proprietor.

In the early years, the Supreme Court applied the Sherman Act to loose combinations (understandings among independent competitors) and abusive acts by single firms with market power in a manner that reflected the multivalued legislative history and the desire to protect competition for the benefit of all—consumers, entrepreneurs, and "the public good."[34] However, the Court ignored the anticompetitive effects of tight combinations effected by mergers and acquisitions.[35] Moreover, it announced principles of law in amorphous terms ("unreasonable" restraints were banned[36]), giving business little information as to what activities were prohibited. Consequently supporters of big and little business alike became disenchanted with the Sherman Act.[37]

In 1912, Woodrow Wilson was elected President of the United States. He promised The New Freedom. He offered the "little man" the chance to succeed, and he promised business greater certainty.[38] In 1914, with the President's encouragement and support, Congress passed the Clayton Act, which enumerated specific antitrust violations (although not with the promised clarity), and the Federal Trade Commission Act, which created the Federal Trade Commission to monitor and prevent business abuse and to provide guidance to businesses.[39]

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[33] *Id.* at 4100.

[34] Standard Oil Co. v. United States, 221 U.S. 1 (1911) (abusive acts by single firm); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1896) (self-regulation by agreement among competitors).

[35] *See* United States v. United States Steel Corp., 251 U.S. 417 (1920). *But see* Northern Sec. Co. v. United States, 193 U.S. 197, 329 (1904).

[36] Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (dictum).

[37] G. HENDERSON, THE FEDERAL TRADE COMMISSION 17 (1924).

[38] G. KOLKO, THE TRIUMPH OF CONSERVATISM 209-10 (1963).

[39] *Id.* at 267; Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976), *as amended by* Pub. L. No. 96-349, § 6(a), 94 Stat. 1154 (1980) (§ 7 of the Clayton Act)); Federal Trade Commission Act, ch. 313, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58 (1976), *as amended by* Pub. L. No. 96-252, 94 Stat. 374 (1980)).

Wilson's ardor dissipated and the bill was weakened. A. LINK, WILSON, THE NEW FREEDOM, ch. XIII (1956). Nonetheless, the law as passed was stronger than the Sherman Act.

If there is one central theme of the legislative history of the Clayton Act, it is freedom of economic opportunity.[40] The Clayton Act promised to open the field "to scores of men who had been obliged to serve when their abilities entitled them to direct."[41] Consumers' interests were an ancillary concern, reflected in Congress's desire to limit producers' power over prices. Legislators wished "properly [to] control . . . the great industrial corporation that really has power—the power to arbitrarily control prices and thus exact unjust profits from the people."[42]

From the passage of the Clayton Act to mid-century, antitrust paled in the shadow of critical events: World War I; the Depression; recovery under New Deal programs that favored business cooperation; the rise of Hitler with the help of the German cartels; and World War II.[43] During these years the Supreme Court applied antitrust principles much as it had done in the early years of the Sherman Act. It protected competition and kept markets open where contracts, conspiracies, and loose combinations were concerned,[44] but it did not apply the law to check increasing concentrations through mergers.[45]

A merger movement arose in the wake of World War II.[46] Statesmen and legislators looked on the movement with alarm. They thought too much power was falling in the hands of too few businesses

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[40] See, *e.g.*, the remarks of Senator Reed:

> [W]e wrote it into our creed, that all men were created free and equal, and that all are entitled to life, liberty, and the pursuit of happiness. We construed "liberty" to mean not merely the right to walk upon the streets of cities . . . but liberty . . . to engage in commerce, to solve for one's self the problem of one's own happiness and success. . . .
>
> So we began enacting legislation calculated to produce a condition which would leave open for all men, big and little, the opportunity to engage in the affairs of life.

51 CONG. REC. 15867 (1914).

[41] Addressing a joint session of Congress on Trusts and Monopolies, President Wilson commented on a limitation on interlocking directorates:

> It will bring new men, new energies, and a new spirit of initiative, new blood, into the management of our great business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct.

Address by the President on Trusts and Monopolies before the Joint Session of Congress (Jan. 20, 1914), H.R. Doc. No. 625, 63d Cong., 2d Sess. 5 (1914).

[42] 51 CONG. REC. 9265 (1914) (remarks of Rep. Morgan).

[43] *See generally* E. GOLDMAN, RENDEZVOUS WITH DESTINY (1952).

[44] *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

[45] *See* United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[46] F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 49 (2d ed. 1980).

and that such concentration would impair economic opportunity, deprive individuals of control over their own lives, and threaten the very existence of free enterprise and political democracy.[47] In 1938 President Franklin D. Roosevelt gave this message to Congress: "[T]he liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. . . . Among us today a concentration of private power without equal in history is growing."[48]

Responding to the President's call, Congress passed a joint resolution creating the Temporary National Economic Committee (TNEC) to study the causes and effects of economic concentration and to offer solutions to the problems it was thought to pose.[49] After extensive hearings, the TNEC recommended the passage of law to halt the merger movement.[50] The FTC likewise issued reports calling for legislative and regulatory remedies to halt the growth of economic concentration.[51] In 1950, apparently influenced by the TNEC and FTC reports and spurred by the Supreme Court's refusal to enjoin U.S. Steel's acquisition of the largest West Coast steel fabricator,[52] Congress passed the Celler-Kefauver Amendment[53] to the Clayton Act, extending the coverage of the antimerger law.

The legislative history of the Celler-Kefauver Amendment speaks clearly and overwhelmingly of the social evils of "concentration."[54] The legislators who supported the Amendment did so on grounds of the dangers of increasing economic concentration, not on grounds of the virtues of efficiency.[55] The most outspoken of the legislators,

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[47] *See* E. GOLDMAN, *supra* note 43, at 453.

[48] 83 CONG. REC. 5992 (1938).

[49] 52 Stat. 705 (1938).

[50] *Final Report and Recommendations of the Temporary National Economic Committee,* S. DOC. No. 35, 77th Cong., 1st Sess. 38 (1941).

[51] *E.g., Report of the Federal Trade Commission, reprinted in Hearings on H.R. 515 Before the Subcomm. No. 2 of the House Judiciary Comm.,* 80th Cong., 1st Sess. 300-17 (1947).

[52] United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[53] Ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (1976), *as amended by* Pub. L. No. 96-349, § 6(a), 94 Stat. 1154 (1980)). The amendment extended coverage to asset acquisitions. The Clayton Act had previously applied only to stock acquisitions. Further, the amendment deleted language that would proscribe only acquisitions that may substantially lessen competition between the acquired and acquiring companies, and replaced it with language proscribing all acquisitions that may substantially lessen competition in any market. *Id. See* B. FOX & E. FOX, CORPORATE ACQUISITIONS AND MERGERS § 7.03[2] (1981).

[54] H.R. REP. No. 1191, 81st Cong., 1st Sess. 2 (1949); S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950); 96 CONG. REC. 16434 (1950) (remarks of Sen. O'Connor); *id.* at 16450, 16452 (remarks of Sen. Kefauver). *See* Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

[55] Congress wished to preserve a society of many small businesses. We may assume that it did not mean to harm the consumer. Apparently, the legislators thought that the consumer would profit by, rather than suffer from, competition among numerous independent businesses. Representative Celler's comments convey the major thrust of the hearings and debates:

including the bill's sponsors, wished to preserve a society of small, independent, decentralized businesses in order to disperse economic and political power and to assure that a Hitler could never rise to power in America.[56]

The case law construing the Celler-Kefauver Amendment was faithful to the legislative spirit. In the 1960s and early 1970s, the Supreme Court applied the merger law to prevent increasing concentration of business assets into the hands of fewer competitors.[57] Competition was defined by the Court as a process that required numerous participants and decentralization.[58] Competition was equated by the Court with deconcentration; and increasing concentration, by definition, lessened competition because it removed an independent source of competitive effort.[59] Applying the merger law to prevent concentration,[60] the Court protected competition as the Court defined it and as the legislature had viewed it.

The Court adopted a parallel approach to cases not involving mergers. It declared that the law prohibited contract restraints that "clogged" the channels of competition and deprived firms of an equal chance to compete on the merits in free and open markets.[61] It

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> Small, independent, decentralized business of the kind that built up our country . . . is fast disappearing, and second, is being made dependent upon monster concentration.
>
> It is very difficult now for small business to compete against the financial, purchasing, and advertising power of the mammoth corporations.
>
> Do not make that competition even more difficult by failing to plug this loophole in the Clayton Act.

95 CONG. REC. 11486 (1949).

[56] Representative Celler said:

> I want to point out the danger of this trend toward more and better combines. I read from a report filed with [the former Secretary of War] as to the history of the cartelization and concentration of industry in Germany: "Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war."
>
> . . . .
>
> I do not want to see my country go the way of Japan or the way of Italy or the way of Germany or even the way of England.

Id. at 11486. *See* remarks of Senator Kefauver, 96 CONG. REC. 16452 (1950). *See also* F. NEUMANN, BEHEMOUTH 22-23 (1942).

[57] Ford Motor Co. v. United States, 405 U.S. 562 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[58] *See* note 57 *supra*. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 369 (1962).

[59] *See* note 57 *supra*.

[60] *See* notes 57-58 *supra*.

[61] *E.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1968); Albrecht v. Herald Co., 390 U.S. 145 (1968); Simpson v.

protected the freedom of the independent trader to sell where and to whom the seller pleased.[62] The Court sometimes invoked consumers' interests, but only when consumers' interests were consistent with competition as process and the rights of free traders.[63] In applying the antitrust laws from the 1950s to the early 1970s, the Court emphasized freedom of traders and competition among many players, not efficiency.[64]

Beginning in 1974, the first year of the Burger Court's antitrust majority, antitrust law shifted course.[65] In a 1977 opinion, the Supreme Court said that market impact must control antitrust decisions.[66] Market impact was assessed in terms of efficiency. In addition, majority opinions by some members of the Court began to reveal a strong undercurrent that business should be left presumptively free to do what it wishes, apparently on the theory that business freedom tends to maximize efficiency or on the theory that greater private business freedom is crucial to a free society.[67] Whereas the word "power" dominated Warren Court antitrust opinions,[68] the words "efficiency" and "market impact" have prominence in Burger Court antitrust opinions.[69] The Burger Court has not given "efficiency" specific content. Moreover, recent opinions of the Court have triggered the claim that antitrust is valid only as a means to promote efficiency.

As history teaches, "efficiency" is not the reason for antitrust.[70] Indeed, those who valued efficiency more than competition opposed

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Union Oil Co., 377 U.S. 12 (1964); United States v. Lowe's Inc., 371 U.S. 38 (1962); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); United States v. United Shoe Mach. Corp., 347 U.S. 521 (1954), *aff'ing per curiam* 110 F. Supp. 295 (D. Mass. 1953), *further divestiture ordered,* 391 U.S. 244 (1968).

In Standard Oil Co. v. United States, 337 U.S. 293, 312 (1949), Justice Frankfurter said for the Court: "[T]he choice between greater efficiency and freer competition . . . has not been submitted to our decision." Congress had decided in favor of freer competition.

[62] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[63] *E.g.,* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[64] *See* notes 61-62 *supra.*

[65] *See, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 411 U.S. 1 (1979); United States v. United States Gypsum Co., 438 U.S. 422 (1978); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[66] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[67] *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-55 (1977). *Compare* R. BORK, *supra* note 13, *with* M. FRIEDMAN, FREE TO CHOOSE (1980).

[68] *See, e.g.,* note 8 *supra.*

[69] *See, e.g.,* note 65 *supra.*

[70] J. DIRLAM & A. KAHN, *supra* note 6, at 9-10, 15-16. *See* McChesney, *On the Economics of Antitrust Enforcement,* 68 GEO. L.J. 1103, 1104 (1980) ("[T]here is no reason to assume that

antitrust bills on grounds that they would constrain some activity that might save costs for a producer and forbid some activity that does not interfere with optimal allocation of resources.[71] Rather than standing for efficiency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes.[72] Interests of consumers have been a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and

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efficiency requires an antitrust system. [Anticompetitive practices tend to correct themselves in the long run.] . . . [A] society that values efficiency will not necessarily demand an antitrust system.").

Nor was "efficiency" the central reason for the American free enterprise system. The United States embraced a market system rather than government ownership of business or governmentally directed allocation of resources because freedom of private economic action and decentralized centers of decisionmaking were components of the American democracy. Even if centralized government control of resource allocation were regarded as more efficient than private-firm competition, since it avoids the wastes of competition (J. DIRLAM & A. KAHN, *supra* note 6, at 16), it seems likely that most Americans would gladly have sacrificed that increased efficiency for increased freedom. *See* Hoover, Rugged Individualism Speech (Oct. 22, 1928), *reprinted in* II GREAT ISSUES IN AMERICAN HISTORY: A DOCUMENTARY RECORD 1864-1957, at 338, 341 (Hofstadter, ed. 1958) (asserting that even if government could run business more efficiently, Americans would choose free enterprise). *See also* M. FRIEDMAN, *supra* note 67; C. LINDBLOM, POLITICS AND MARKETS (1977); B. WARD, THE IDEAL WORLDS OF ECONOMICS (1979); Hayek, *The Moral Element in Free Enterprise,* and other essays in THE INVISIBLE HAND 69 (A. Classen ed. 1965).

[71] See Blake, *Conglomerate Mergers and the Antitrust Laws,* 73 COLUM. L. REV. 555 (1973), describing the view of economists at the time of the passage of the Sherman Act that the market, unconstrained by antitrust, would produce efficiencies:

> If anything, the tendency of the American Economic Association [in 1890] was to question the wisdom of any legislation directed against "monopoly" in the economic sense, since the prevalent economists' view was that monopoly power, unbuttressed by legal supports such as patents, tariffs, licensing and the like, was by its nature rapidly eroded by market forces, and that legislative intervention would either impede that process or involve unnecessary social costs.

Id. at 577. *See also* III DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION: 1865-1918, at 117-24 (1949).

[72] Dispersion of economic power serves economic and political goals. Politically, dispersion tends to prevent any one firm or combination of firms from having undue access to the political system. Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051, 1053-54 (1979). *See* Brodley, *supra* note 1, at 871; 21 CONG. REC. 2457, 2459-60 (1890) (Sherman Act debates—remarks of Sen. Sherman). Economically, dispersion tends to promote flexibility of firms to respond to new and changing consumer needs. Concentration may tend to calcify and rigidify. *See* B. KLEIN, DYNAMIC ECONOMICS (1977); Taber, *supra* note 9, at 40 (quoting Scitovsky). *But see* Bock, *Concentration: Issues, Convictions and Facts, Overview,* Holmes, *Concentration and Prices,* and Benston, *Differences in Perceptions,* all in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 167, 186, 196.

Dispersion is sometimes associated with increased risks as well as increased incentives, initiative, flexibility, and responsiveness. Concentration is sometimes associated with increased security, as well as bureaucracy, complacency and rigidity. B. KLEIN, *supra.*

lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.

One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): competition as process. The competition process is the preferred governor of markets.[73] If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair.[74] Some measure of productive and allocative efficiency is a by-product, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private hand.[75]

In sum, the claim that efficiency has been *the* goal and *the* fulcrum of antitrust is weak at best. The values other than efficiency that underlie the commitment to power dispersion, economic opportunity, and competition as market governor demand equal attention. The basis upon which some scholars affirmatively have rejected these historic objectives as goals of antitrust[76] is not apparent. The reasons offered do not withstand scrutiny.[77]

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[73] In practice, United States markets are neither perfectly competitive nor impersonal. It is not feasible to restore the invisible hand of competition at this stage of industrialization and technological development. *See* A. CHANDLER, THE VISIBLE HAND (1977). However, it is feasible to maintain competition as process to the extent consistent with consumer interests.

[74] "Fair" is used to connote that the results of an impersonal process set into place by social contract are generally accepted as fair.

[75] *But see* Lange, *On the Economic Theory of Socialism,* in ECONOMIC FOUNDATIONS OF PROPERTY LAW 69 (B. Ackerman ed. 1976).

[76] Professor Bork takes the position, despite overwhelming legislative history to the contrary, that the sole goal of the Sherman Act is to maximize consumer welfare. *See* R. BORK, *supra* note 13, ch. 2, at 50-71. *But see generally* 21 CONG. REC. 2457, 2459-60 (1890) (Sherman Act debates). *See also id.* at 1570, 2457, 2459-60 (remarks of Sen. Sherman); R. HOFSTADTER, *What Happened to the Antitrust Movement?,* in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 200 (1965); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 153 (1977); H. THORELLI, *supra* note 6, ch. IV, at 134-265; Brodley, *supra* note 1, at 867; Flynn, *supra* note 1; Letwin, *supra* note 12; Letwin, *English Common Law Concerning Monopolies,* 21 U. CHI. L. REV. 355 (1954); Pitofsky, *supra* note 72; Schwartz, *supra* note 1.

Professor Bork notwithstanding, the Sherman Act was directed against the power of and abuses by great integrated enterprises, despite their achievement of unequalled efficiencies. *See, e.g.,* Chandler, *Historical Perspectives and Political Protest,* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 214; A. NEVINS, JOHN D. ROCKEFELLER (1940); The Sherman Act Debates, *supra* note 72.

Professor Posner agrees with Professor Bork that the antitrust laws were designed principally to maximize consumer welfare. In *Antitrust Law,* Posner states:

> The framers of the Sherman Act appear to have been concerned mainly with the price and output consequences of monopolies and cartels, whereas the common law

The elevation of efficiency to the antitrust pedestal reflects something other than deference to stare decisis and something more than a choice of the only feasible route to reasonably clear antitrust principles. It, like all other choices for antitrust policy, reflects a normative judgment about what antitrust should do.

IV

MICROECONOMICS, POLITICAL THEORY, AND PERSONAL STAKE

Recognizing that the choice of efficiency as the fulcrum of antitrust reflects a value judgment, this section identifies bases on which that choice may be made. One explanation is professional training in economics or other personal orientation toward exclusive use of an

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> of monopolies and restraints of trade had a miscellany of objectives mostly unrelated and sometimes antipathetic to competition and efficiency. . . .
>
> . . . The Sherman Act did not enact the common law of restraint of trade. A better guide to interpreting the Sherman Act is the economic analysis of monopoly.

R. POSNER, *supra* note 13, at 23-24 (omitted footnotes cite solely to an article by Professor Bork).

Professors Areeda and Turner are more generous in their acknowledgement of history. They refer to some political and social concerns of the antitrust laws. However, they, too, brush aside such concerns and decide that non-economic purposes are not important to antitrust. 1 P. AREEDA & D. TURNER, *supra* note 12, ch. 1, at 3-33. The Areeda and Turner interpretation contrasts with the earlier Kaysen and Turner interpretation, which stated:

> It is obvious that in passing the Sherman Act, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." The legislators were well aware of the common law on restraints of trade, and of the power of monopolists to hurt the public by raising price, deteriorating product, and restricting production. At the same time, there was at least equal concern with the fate of small producers driven out of business, or deprived of the opportunity to enter it, by "all-powerful aggregations of capital." There was no obvious inconsistency in these two interests.
>
> . . . [I]t seems probable that [the legislators] also desired to protect equal opportunity and equal access for small business for noneconomic reasons . . . .

C. KAYSEN & D. TURNER, ANTITRUST POLICY 19 (1959) (footnotes omitted).

[77] The reasons offered for discounting non-efficiency goals are unsatisfactory. The commentators who discount these goals claim that they are too vague and that equalization of economic opportunity and preservation of competition as a process will protect inefficient firms and harm consumers. *See* 1 P. AREEDA & D. TURNER, *supra* note 12, ch. 1 (equalization of economic opportunity); R. BORK, *supra* note 13 (preservation of competition process). *But see* 1 P. AREEDA & D. TURNER, *supra* note 12, at 293 (rejoinder to Bork).

All of the basic goals of antitrust, however, were given specific meaning during the Warren Court years; the developed principles are capable of further refinements and they can be retained without protecting inefficiencies. For example, as a rule of thumb, it was illegal for any leading competitor in a concentrated or concentrating market to remove any substantial competitor, supplier or buyer, by acquisition; and it was illegal per se to impose customer or territory restrictions on buyers. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Justice Department Merger Guidelines, 1968, *reprinted in* B. Fox & E. Fox, *supra* note 53, App. 11. For efficiency principle to analyze market problems. Individuals schooled in economics are trained to think about how markets work and how consumers may be satisfied. Economics teaches that markets work to maximize the material well-being of people. Business behavior that maximizes aggregate material well-being is deemed "efficient." Economics as a discipline values competition only as a process for the production of "efficient" outcomes.[78]

Introduction of non-economic values may be threatening or bothersome to individuals attempting to apply economics. The non-economic values are foreign matter, and the discipline rejects them.

Yet another basis for choosing efficiency as the fulcrum of antitrust is political philosophy. Certain political philosophies correspond with certain conceptions of what antitrust should do. The conservative and libertarian world-views lean towards less government intervention, in order to protect the established order and stability, or to maximize (a view of) individual freedom. Individuals having these perspectives question the existence of corporate power. The power that resides in one central government is far more worrisome to them than power that may reside in a number of private businesses. They see market entry barriers as almost always low and surmountable by skill and energy, and they view consumers as sovereign—that is, the controllers of producer behavior. They believe that all people of equal abilities have equality of economic opportunity, that those business people who serve consumers best will succeed, and that any attempt to equalize opportunity in the marketplace (like affirmative action) frustrates meritocracy.[79] If the job of antitrust is, and is only, to prohibit transactions that impair efficiency, then government interference with private business transactions is minimized and the values of a free society (as they define it) are preserved. Therefore, the conservative and libertarian philosophies tend to correspond with the view that antitrust should be limited to a narrow role in monitoring efficiency.

By contrast, the liberal[80] tends to distrust large aggregations of wealth and power. The liberal world-view sees private corporate power as a reality and a danger. The liberal view tends to regard entry

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application of multivalued goals in ways that will not protect inefficiencies, see text at section VIIB *infra*.

[78] *See* P. SAMUELSON, ECONOMICS 508-09 (11th ed. 1980). Consumer surplus is one measure of consumer satisfaction. Consumer surplus represents the difference between what consumers would be willing to pay for a given quantity of goods and what they actually pay. *Id.* at 412-14.

[79] I. KRISTOL, TWO CHEERS FOR CAPITALISM (1978); B. WARD, *supra* note 70, Book Three; Demsetz, *The Trust Behind Antitrust,* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6; Hayek, *supra* note 70, at 77.

[80] "Liberal" here refers to its twentieth century political meaning. The word does not refer to the eighteenth century laissez-faire liberal.

barriers to markets as high and often insurmountable and producers as sovereign and manipulative of consumer wants. Liberals tend to perceive great inequalities of economic opportunity caused by, among other things, power wielded and barriers strategically placed by large, established firms. The liberal view is compatible with government intervention to prevent concentrations of power and wealth and promote greater equality of economic opportunity.[81] The liberal philosophy, therefore, tends to correspond with the multivalued view of antitrust. Indeed, at the extreme, the liberal might prefer dispersion of power and greater economic opportunity for business without power to efficiency.[82]

A variety of other factors apparently influence individuals' judgments about what antitrust should do. Some individuals form a judgment that a central concern with American economic and derivatively political strength in the world is more important than a central concern for consumers. Others have a preference for limiting the discretion of the judiciary. Business managers may desire freer rein or greater profits. Each of the above concerns may lead toward a narrower role for antitrust. One obvious way to minimize the influence of antitrust is to confine it to the role of increasing efficiency, and to define efficiency in terms of business autonomy.

V

The Concepts of Efficiency Claimed for Antitrust

The foregoing sections explored a variety of goals of antitrust, expressed by legislators and jurists, including but not limited to efficiency. In this section, we focus our attention on efficiency, and shall discover that the spectrum of views as to how antitrust should produce or conduce to efficiency is nearly as wide as the spectrum of views as to what ends antitrust should serve. Virtually all contemporary scholars and jurists agree that antitrust law and enforcement should tend to increase the responsiveness of producers to consumers' wants, and many maintain that it should tend to optimize the use of scarce resources. There is, however, vigorous disagreement about the appropriate conceptual mode for attempting to attain the desired end. Approaches vary from reliance on interaction among numerous, rivalrous competitors to reliance on business judgment.

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[81] C. Lindblom, *supra* note 70; B. Ward, *supra* note 70, Book One; Schlesinger, *Is Liberalism Dead?*, N.Y. Times, Mar. 30, 1980, § 6 (Magazine).

[82] *See* B. Ward, *supra* note 70; Sullivan, *supra* note 1.

Thus, the notion that efficiency should be the guide to antitrust analysis on the theory that it provides a clear and certain path and eliminates the need for difficult choices among conflicting policy values is false. The very selection of one or another approach to efficiency involves confrontation of the same, difficult questions of policy.

As two distinguished scholars have discerned:

> The proposal [for using solely economic concepts in appraising all acts supposed to violate the antitrust laws] offers not the prospect of greater certainty and shorter litigation . . . but utter confusion. Economists are no more likely to agree than lawyers; only a disillusioned lawyer or a brash economist could believe otherwise.[83]

This section analyzes three approaches to assessing efficiency for purposes of antitrust. The first approach calls for microeconomic calculations to determine whether challenged activity is likely to lead to restriction of output. Using this approach, individuals applying welfare economics measure "producer and consumer welfare," the sum of which is "social welfare." Proponents urge that antitrust should reach only acts that artificially lower and thereby impair social welfare.

A second approach relies on business autonomy, limited only by the clearest evidence that private action wastes resources. This conception assumes that business bahavior is efficient. By this approach, antitrust would have a yet narrower role. The third concept is preservation of competition as a process. This conception focuses upon rivalrous interaction among numerous firms in "free and open" markets and protects access and opportunity of firms without market power. This approach assumes that the process protected is likely to produce the best result for consumers.

This Article does not presume to resolve, by economic argument, the contest among and even within the three perspectives.[84] Indeed, the persistence of debate among the economists may lend support to the proposition that economics holds no one answer. Against this

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[83] J. DIRLAM & A. KAHN, *supra* note 6, at 269-70.

[84] For an illustration of the illusory qualities of the pursuit of "efficiency," see T. ARNOLD, THE FOLKLORE OF CAPITALISM 168-71 (1937), wherein Arnold "proves" that efficiency is inefficiency and that humanitarianism, which is alleged to be the object of efficiency, is inhumane.

For an example of the diversity of views among economists, compare Demsetz, *The Trust Behind Antitrust,* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 45, with Posner, *supra* note 13, and Nelson, *Comments on a Paper by Posner,* 127 U. PA. L. REV. 949 (1979) and Adams, *Antitrust and a Free Economy,* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 33.

background, we turn to three conceptual modes of describing efficiency.

A. *Restriction of Output*

Proponents of the output-restriction approach assert that antitrust lawsuits should be brought only to challenge inefficient transactions or conduct, and that inefficiency should be measured by the power of producers to restrict output.[85] Even if artificial output-restriction is threatened, proponents may require the antitrust enforcer or jurist to examine whether enforcement would frustrate achievement of scale economies. Enforcement would proceed only if resource loss from failure to achieve scale economies does not outweigh resource loss from artificial output restriction.[86]

Proponents assert that the only goal of antitrust is to improve allocative efficiency. The output-restriction theory is applied as the means to that end.[87] Therefore, understanding of output limitation theory requires understanding of allocative efficiency.

For an example of the diversity among individuals who use welfare economics as their guide, compare R. POSNER, *supra* note 13, with F. SCHERER, *supra* note 46. Much of the diversity can be explained by different assumptions regarding the speed with which market forces will discipline exploitative and weak producers and catalyze the flow of resources into noncompetitive markets, and, conversely, the height of barriers that may obstruct successful challenge by newcomers to established firms.

[85] In a perfectly competitive market, no producers have power over output. All are price takers. If a producer restricts its output and charges more than the going market price, it will lose all of its sales and its competitors will increase production to fill the gap.

At the other extreme, in a high-barrier monopoly or tight oligopoly, where consumers have no close alternatives and neither potential suppliers nor fringe producers can move swiftly into a breach, the producers are price makers. Not only do they have the ability to set price above cost, with correspondingly lower output, since fewer units will ordinarily be sold at the higher price, but they have the economic incentive to do so. If the market is occupied by a monopolist, the monopolist itself will determine and set its profit-maximizing price. If the market is dominated by oligopolists, the producers cannot legally agree on the price that maximizes their joint profits. However, market conditions may be conducive to interdependent behavior, such as price leadership, whereby the firms might arrive at an oligopoly price without agreement. In either case, the result is a price that is higher than the theoretically optimal price. Consumers who wish to buy the goods at the competitive price but are unwilling to buy at the monopoly price are likely to divert their purchases to a substitute product. Thus, producers devote too few resources to the production of the monopoly good and too many resources to the production of alternative goods, and society's scarce resources are thereby misallocated.

[86] W. BAXTER, P. COOTNER & K. SCOTT, RETAIL BANKING IN THE ELECTRONIC AGE: THE LAW AND ECONOMICS OF ELECTRONIC FUNDS TRANSFER, ch. 5 (1977). The enforcer may balance loss of the incentive to innovate, along with resource loss from output restriction, against loss of resources that would result from below optimal scale. *Id.* at 84-91. See Muris, *The Efficiency Defense Under Section 7 of the Clayton Act,* 30 CASE W. RES. L. REV. 381 (1980), advocating an efficiencies defense in merger cases.

[87] *See id.;* R. POSNER, *supra* note 13.

Allocative efficiency is an ideal state. It contemplates that all resources across all markets in the economy are allocated to their best use in view of consumer wants and willingness to pay the price it costs society to make and distribute the goods. In a state of perfect allocative efficiency, the fewest possible resources are consumed to satisfy consumer wants. In such a state, the aggregate wealth of the nation is maximized, and individuals as consumers are assumed to be better off.

Because of the multitude of imperfections in markets in our economy, allocative efficiency cannot be achieved; the necessary conditions cannot be met.[88] Further, alteration of some conditions within one or another market to improve output therein does not necessarily even tend towards allocative efficiency. If, for example, resources are drawn into an oligopoly market from a monopoly market in an attempt to improve output in the former, the allocation of resources may be further distorted rather than improved.[89]

Tendencies toward optimal output in a market will, however, improve the position of consumers as buyers of the targeted product, because more units of that product will be available. In addition, the greater output will have a distributive effect, because all units generally will be available at a lower price. The lower price to the buyer of

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[88] Allocative efficiency in a free enterprise economy can be achieved only if all firms are of sufficient size to realize all significant economies of scale, and all markets are either competitively structured (that is, they comprise a significant number of producers with no one or few having market dominance) or entry barriers are low. In such cases, all producers are price takers; the market, not the producers, sets the price. The market forces cause resources to move to the production of goods that consumers want, given the distribution of wealth. Prices move down to marginal cost, and output is optimal to serve consumer wants at that cost. F. SCHERER, *supra* note 46, ch. 2.

Optimal allocation of resources is frustrated by externalities, market imperfections, and the problem of the second best. Externalities are costs that are imposed by a business firm that are not borne by that firm, such as certain costs of pollution. Thus, externalities are social costs not accounted for in private costs. Because the price of the good does not reflect its full cost, consumers get the "wrong" signal and will buy too much of that product. Therefore, output will be inefficiently high. *See* P. SAMUELSON, *supra* note 78, at 449-50.

Market imperfections are defects in the functioning of markets. Malfunction may be caused by monopoly, the absence of information, and government regulation. Market imperfections that increase the price of a product give the wrong signal to consumers. Consumers will buy too little of the product, and output will be inefficiently low.

The problem of the second best connotes the circumstance that an apparently second best solution may be no solution at all. Corrective action in one market does not necessarily improve resource allocation. For example, conversion of pricing in one market from monopoly pricing to competitive pricing does not improve resource allocation if resources are drawn from another monopoly or a limited monopoly market. Resources would then be drawn from a market in which output is already too low, causing output in the market of deflected demand to be even lower. Lipsey & Lancaster, *The General Theory of Second Best,* XXIV REV. ECON. STUD. 11, 17 (1956).

[89] *See* note 88 *supra.*

the targeted product may be a worthy objective,[90] but it is not an efficiency concern. The efficiency loss is, rather, "the loss associated with substituting an alternative good for the monopolized good."[91] Thus, society loses not because producers extract surplus from consumers, but because demand is deflected from goods in the monopolized market to other goods that cost society more resources to make.

1. *Output Restriction and the Measurement of Social Welfare Loss*

In view of the absence of tools to measure resource misallocation caused by private acts, a number of economic theorists have adopted as a proxy the measurement of artificial output restraints within given markets. They frequently identify their goal as maximization of consumer welfare. As a consequence, the goal of preventing artificial output restraint and the goal of maximizing consumer welfare have become synonymous to many students, practitioners, and policy makers.

The terminology "social welfare" and "consumer welfare" may create confusion. The layperson may be led to believe that the words encompass all consumer interests, or that the well-being of the individual who buys the product in the market of the restricted output is the object of the economist's concern. This is not the case. The economic theory described is concerned with maximization of "social welfare." The social welfare loss is a resource loss—that is, the use of unnecessary resources to satisfy the diverted demand of individuals who would have been satisfied with a product in the market of the restricted output if that product were sold at cost.

In short, welfare economics uses "welfare" and "consumer welfare" in a technical sense that does not necessarily correspond with general notions of consumer interests. "Consumer welfare" does not reflect the interest of consumers in preventing monopolists from extracting monopoly profits. It ignores various other consumer interests that may be expected to flow from a competitive economy, including diversity of source, variety of product, and innovation. To avoid perpetuating the confusion caused by use of the technical phrase

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[90] Professor Sullivan concludes:

> [T]here is no theoretical reason to assume that maintaining competition in any given market will tend toward the goal of optimum resource allocation in the welfare sense. . . . However, maintaining competition in any industry will in that industry tend toward prices which are closely related to cost, efficient methods of production and distribution, and the social and political goals of antitrust.

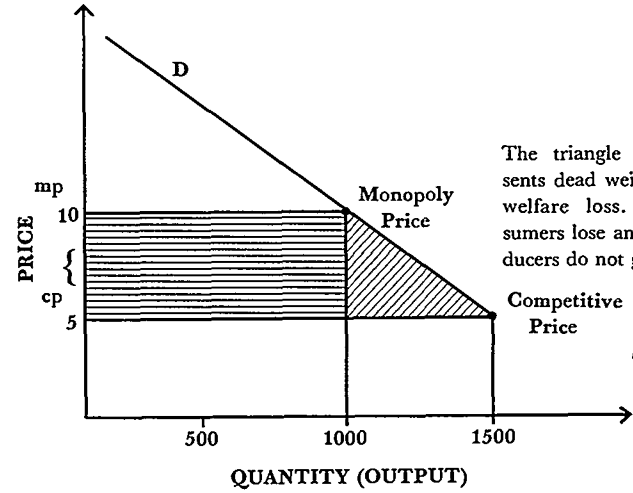
L. SULLIVAN, *supra* note 76, at 21 n.5.

[91] W. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1084 (1980).

"consumer welfare," this Article calls the welfare approach "output-limitation theory."

Output limitation theory can be captured in a diagram. The theoretical loss to society from the impairment of social welfare is depicted as follows:[92]

The rectangle represents monopoly profit; a transfer of wealth from the consumer to the monopolist.



The triangle represents dead weight or welfare loss. Consumers lose and producers do not gain.

As the diagram demonstrates, the monopoly pricing causes lower output. The rectangle at the left represents the amount produced and sold at the monopoly price. The triangle at the right represents the additional amount that in theory, could have been produced "profitably" by the producer but which the monopolist refrained from producing in order to protect its profit margin.

The microeconomic concern is not that some consumers pay the monopoly price and are thereby successfully exploited by the monopolist. This phenomenon represents "merely" a transfer of wealth from willing consumers to the monopolist.[93] The economic concern centers on the welfare triangle: Output in the market is too low in light of consumer demand for the product at a competitive price. Too few of

[92] In the diagram, the horizontal axis represents the quantity of the product produced, and the vertical axis depicts the price of the product. The demand curve (D) slopes downward, reflecting greater demand and greater output (quantity) at lower prices. The monopoly firm will sell at the monopoly price of 10. At that price it can sell, and therefore it produces, 1,000 units. If the firm had been forced to price at the competitive price of 5, however, it would have produced and sold 1,500 units. The shaded rectangle represents a transfer of wealth from consumers to the monopolist. The shaded triangle represents the dead weight or welfare loss. This triangle reflects the additional quantity that consumers wished to buy and were prepared to buy at a compensatory price lower than the monopoly price; they did not buy this quantity because they were unwilling to pay the monopoly price. The dead weight loss represents a loss to society, because consumers lose and producers do not gain. It is an opportunity unrealized.

[93] W. Baxter, P. Cootner & R. Scott, *supra* note 86, at 94; F. Scherer, *supra* note 46, at 20; Kamerschen, *Summary of the Economic Effects of Monopoly*, in Calvani & Siegfried, Economic Analysis and Antitrust Law 20, 42 (1979); W. Schwartz, *supra* note 91.

society's resources are allocated to this market, and the resources that should be so allocated are diverted to more costly production.

2. *The Goals and Limits of Policy Based on Output Restriction*

Power to control output, or to increase control over output, may result from monopoly, oligopoly, or conspiracy. This Article discusses each of these three conditions below to demonstrate the necessary, although not sufficient, conditions for an antitrust violation according to output limitation theory. In the case of mere monopoly power or oligopoly power, many economic theorists would require inquiry to determine whether resource loss from output limitation is offset by resource gain from increased productive efficiency (that is, lower cost of inputs); and in all events, further inquiry is necessary to determine whether producers performed an act that the law reprehends.

The economist's prime example of power to limit output is a monopoly in a well-defined market, wherein the consumer has no good substitute and barriers are too high for a potential entrant to surmount. In the absence of any of the foregoing conditions, the producer does not have power to limit output or, at the least, the existence of alternatives seriously limits power.

United States v. Aluminum Company of America (*Alcoa*)[94] is a prominent example of alleged and adjudicated monopoly. Yet *Alcoa* would fail the power test of the output theorists. Alcoa was the only domestic producer of virgin aluminum. Foreign producers accounted for ten percent of all virgin aluminum sold in the United States. Alcoa did not extract monopoly profits, but realized only a reasonable rate of return. If Alcoa had restricted its output and had tried to extract a monopoly profit, the rise in price probably would have brought into the United States a stream of imports to satisfy the residual demand, or else new entry by American producers probably would have closed the gap. If such were the facts, Alcoa did not have the power to control output. Proponents of the output-control theory of antitrust would conclude therefrom that Alcoa did not have monopoly status.

Oligopoly provides a second potential target for enforcement. Oligopoly behavior is characterized by lack of competitiveness. That condition is most likely to occur when only a few competitors occupy the market, they have similar technology, similar costs, and general commonality of interests, and barriers to entry are high. In such a situation, theory predicts that the producers will act interdependently and will price in lock-step to maximize their joint profits. At worst, they may reduce output to a point that approaches the monopoly condition. If any one of the conditions conducive to oligopoly behav-

[94] 148 F.2d 416 (2d Cir. 1945).

ior is absent, however, as is usually the case, the producers generally have little or no power to limit output.

Output limitation theory could have particular application to mergers that produce or rigidify oligopoly, because the law reprehends anticompetitive mergers, and output limitation theory holds that mergers that produce output limitation are anticompetitive; all other mergers are not. The tender offer competition for Conoco provided a test of output theory. The competition occurred in the summer of 1981, at a time when government officials had announced that antitrust enforcement policy would be based on the tendency of the transaction to limit output.[95]

Conoco is the ninth largest oil company and the leading second-tier oil company in the United States. Mobil is the second largest oil company in the United States, and was one of the bidders for the stock of Conoco. Du Pont, the largest American chemical company and a leading user of petrochemical-based products sold by Conoco, was another of the bidders. Du Pont won the tender offer battle, with the blessing of the Department of Justice.[96]

The Department was not concerned with the possible foreclosure effect of a du Pont-Conoco merger, on grounds that the merger did not tend to limit output. More remarkable was the facial credibility accorded to Mobil's contention that a Mobil-Conoco marriage would not lessen competition.[97] That contention, however, was predictably spawned by the limits of output theory. Had an antitrust plaintiff been put to its proof that Mobil's acquisition of Conoco would increase Mobil's power or the power of the major American oil companies to restrict the output of oil, Mobil would have had a reasonable chance of defeating the antitrust charges. The domestic oil industry is not highly concentrated. In 1978, the four-company concentration ratio was 28.1% for crude oil and condensate production and 31.4% for refining capacity.[98] Proof of any one of the following sets of facts probably would have defeated the claim that Mobil would gain power to restrict output by acquisition of Conoco: (1) OPEC, and not the

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[95] *See* Fox, *From Antitrust to a Trust—in Business,* 28 ACROSS THE BOARD 59, 62 (Nov. 1981) (The Conference Board).

[96] United States v. E.I. du Pont de Nemours & Co., [1981] 5 TRADE REG. REP. (CCH) ¶ 50,795 (proposed final consent judgment, 1981).

[97] *See Mobil's Conoco Bid Sparks Moves by Justice Agency and Legislators,* Wall St. J., July 10, 1981, at 3, col. 1.

The Department of Justice served a request for additional information upon Mobil. Simultaneously, Assistant Attorney General Baxter issued an unusual announcement: "Issuance reflects our need for additional information to reach a judgment whether antitrust problems are present; it does not reflect even a tentative judgment that the acquisition would be impermissible." Press Release, Department of Justice, Antitrust Division, July 31, 1981.

[98] *Three Views of the Merger Battle: Conoco's Case Against Two Bidders . . . Mobil's Reply . . . and Seagram's Ire,* N.Y. Times, Aug. 2, 1981, § III (Business and Finance Section), at 2, col. 3.

United States oil firms, controls output. (2) Exxon remains much larger than Mobil; Mobil's increment in size would merely make Mobil more competitive with Exxon and would not confer any power over supply. (3) The market is so fragmented (no firm has ten percent or more) and so many fringe firms and foreign producers could expand output or divert production to the United States that the necessary conditions for successful cooperative behavior are absent. (4) If the leading domestic oil firms have market power, they already extract the maximum excess profits from the consumer; they have reached the limit of any output restriction.

Cartel agreements are a third means by which output limitation can be achieved. Cartels are agreements among competitors to control the market by fixing price, dividing customers or territories, or apportioning production quotas. Such agreements are likely to achieve market control only where there are relatively few producers in the market, the producers have similar costs, they all are parties to the agreement, and entry into the market is difficult. In the absence of these conditions, the higher cartel price is likely to attract entry by outsiders and induce cheating by insiders, and the cartel will self-destruct.[99]

In sum, output theory provides a basis for challenging monopoly of a sort that virtually never exists, for challenging transactions such as mergers that produce increments in the power to cut back production (a condition that seldom can be proved), and for challenging cartel agreements that have a chance of success.

A statute designed to implement output-restriction theory would bear passing resemblance to the Sherman Act, but no resemblance to the Clayton Act. This hypothetical statute would, by one scheme, prohibit monopoly and oligopoly in well-defined high-barrier markets unless productive efficiency outweighs dead weight loss.[100] When

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[99] *See* McGee, *Ocean Freight Rate Conference and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 196 (1960).

[100] Scholarly debate persists as to whether, in some or many unregulated markets, economies of scale demand a size so large relative to the market that productive efficiency is incompatible with the existence of the number of competitors necessary to produce effective competition.

Professor Bork asserts that there are siguificant trade-offs between productive efficiency and the degree of allocative efficiency that would be produced by competitive market pressures from numerous competitors. R. BORK, *supra* note 13, ch. 6. Professors Areeda and Turner hold the contrary view that a conflict between productive efficiency and competition is unlikely:

> As to the choice between efficiency and competition, it might be feared that scale economies are so pervasive and so continuous that either antitrust concern with competitive structure should be abandoned, or, on the contrary, efficiencies should be iguored lest they validate ever-increasing market concentration. Fortunately,

productive efficiencies justify oligopoly, the law would prohibit collusion among oligopolists, perhaps even some avoidable forms of interdependence among them.[101] Where arbitrage can be prevented, the law would encourage price discrimination by justified monopolists or oligopolists in order to maximize output to the point of consumer willingness to buy at a price acceptable to the seller.[102] There would be no special merger law, and there would be no specific prohibitions against exclusive dealing or tying. The law would permit market-sharing, specialization, and price agreements among small firms and firms in fragmented or low-barrier markets. The law would provide no right of compensation to consumers "injured" by a monopoly or oligopoly overcharge. Nor would it accord a right of compensation to "injured" competitors. The only social harm recognized would be the resources wasted in securing monopoly power and the harm reflected by the welfare triangle[103]—that is, the resource loss caused by the failure of producers to increase their production to the point that would satisfy all consumers willing to pay at least a competitive price.[104] The law would provide a remedy deemed sufficient to deter output restriction.

B. *Business Autonomy*

With increasing frequency, efficiency is defined in terms of business freedom: maximizing, with only limited constraints, the freedom or autonomy of firms to engage in private transactions of their choice.

> the evidence largely undercuts such fears. As we have already noted, some concentration is not inconsistent with workably competitive results. As we shall shortly point out, the evidence indicates that least-cost output very rarely requires monopoly, and seldom requires high concentration.

2 P. Areeda & D. Turner, *supra* note 12, at 293 (footnote omitted). Research by Professor Scherer supports the Areeda-Turner conclusion. F. Scherer, *supra* note 46, at 133-38.

[101] Basing point pricing is an example of avoidable interdependence. *See* FTC v. Cement Institute, 333 U.S. 683 (1948).

[102] If a monopolist could engage in perfect price discrimination by selling to each customer at the price that customer is willing to pay, it would not have the incentive to restrict output. The monopolist has the incentive to restrict output because the availability of units to some buyers at a competitive price will induce those buyers to become arbitrageurs; they will buy at the lower price and resell to the disfavored customers. The monopolist assumes that if it sells any units at a competitive price it must forego its monopoly profit on all other units. Therefore, unless the monopolist can prevent arbitrage, it charges only the higher monopoly price.

[103] *See* note 92 and accompanying text *supra*.

[104] *See* W. Schwartz, *supra* note 91, at 1081-85. Professor Schwartz writes:

> There is no direct correlation between the monopolist's gain and social harm because the gain consists of the redistribution of wealth associated with monopoly pricing [not an efficiency concern], whereas the social loss consists of the resources wasted in securing monopoly power and the misallocation of resources associated with monopoly pricing.

Id. at 1082 n.27.

The linkage between efficiency and autonomy may reflect one of two quite different ideas or goals. First, proponents claim that autonomy conduces to productive efficiency; efficiency is the desired outcome and autonomy is the means to that end. Second, advocacy of business autonomy may serve social, political, or personal objectives by minimizing government interference with business decision-making. A pragmatic way to minimize the role of government in antitrust is to confine antitrust to the role of increasing efficiency and, in turn, to define efficiency in terms of business autonomy.[105]

The claim that autonomy conduces to efficiency may be stated as follows: Business firms are profit-maximizing. Private decisionmaking tends to maximize productive efficiency, because the firm itself knows best how to reduce costs and satisfy consumers. Competition among productively efficienct firms tends to maximize allocative efficiency, because the competitive pressure exerted by such firms is the best spur to improved performance and to investment decisions that are responsive to consumer wants.[106]

Antitrust law historically has valued freedom and autonomy of firms without market power.[107] In contemporary debates, however, proponents seek increased autonomy for firms with leading and dominant positions in concentrated markets.[108] Increased autonomy could mean preference for freedom of firms with power at the expense of

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[105] *See* Rowe, *New Directions in Competition and Industrial Organization Law in the United States,* in ENTERPRISE LAW OF THE 80's, at 177, 201 (F. Rowe, F. Jacobs & M. Joelson eds. 1980).

[106] *See* R. BORK, *supra* note 13.

[107] *See, e.g.,* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Topco was later approved in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) and California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). *See also* Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Von's Grocery Co., 384 U.S. 270 (1966).

Justice Oliver Wendell Holmes took a contrary view. He construed the Sherman Act as the embodiment of the English common law against restraints of trade. The English common law sought to protect the liberty of people to practice their craft or trade. It did not prevent cooperation among competitors, as long as that cooperation did not exclude others from plying their trade. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Holmes's permissiveness toward competitor cooperation was never accepted as a basis for antitrust policy. Rather, a quite different concept of freedom of trade and commerce has become deeply embedded in our American antitrust law. *See, e.g.,* United States v. Topco Assocs. Inc., 405 U.S. 596 (1972); Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[108] *See., e.g.,* R. BORK, *supra* note 13.

competitive opportunity for firms without power, and possibly at the expense of lower price or greater choice for the consumer.[109]

The second approach—to minimize government intervention by confining antitrust to narrow efficiency goals—is a strategy rather than a theory. Commitment to the autonomy principle may reflect the political philosophy of the libertarian,[110] or a less sweeping political preference for allocating more discretionary power to private business and less to government or private enforcers. It may reflect political disagreement with the socio-political goals of antitrust, or a preference for limiting judicial discretion.[111] It may stem from a judgment that a need to muster American economic and political strength in the world overshadows the economic or political contributions of antitrust. Or it may signify merely the private interest of the business person in freer rein or greater profits.

The autonomy approach to antitrust cannot be carried to the extreme or it would trump the law. Therefore, even those who favor autonomy must make a concession to antitrust. A minimal concession is recognition of the output theory, limited by assumptions that reflect a faith in the free market to reward efficiency, to remove inefficiency, and to punish exploitation.[112]

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[109] *See, e.g.,* R. POSNER, *supra* note 13; F. SCHERER, *supra* note 46. Consumer interests require, particularly, that acts of dominant and leading firms in concentrated markets be scrutinized and possibly restrained. *Id. See also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

[110] *See* M. FRIEDMAN, *supra* note 67. Economic libertarianism, particularly when carried to its extreme, is incompatible with antitrust. "Liberty" for big business cannot fairly be classified as a value than underlies existing antitrust legislation. Rather, libertarianism argues against antitrust statutes. *See, e.g.,* Demsetz, *The Trust Behind Antitrust,* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 45; Brozen, *No . . . The Concentration-Collusion Doctrine,* in *id.* at 90. See also Northern Sec. Co. v. United States, 193 U.S. 197, 351 (1904): "But this Court has heretofore adjudged that . . . liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce."

[111] *See* R. BORK, *supra* note 13, at 82-83.

[112] The assumptions include: business is motivated to achieve lowest cost of imputs and thus to achieve greatest scale economies; resource loss from failure to achieve scale economies almost always exceeds resource loss caused by deviation from marginal-cost pricing; competition is presumptively dynamic and incentives to innovate are great, even if few firms occupy a market; consumers are sovereign and firms must cater to their wishes to survive and achieve success; markets function well and will quickly punish an exploitative or unresponsive producer; resources move quickly to their highest and best use (what consumers want most); there are no barriers to entry other than technology or government imposed restraints, and any barriers that do exist are virtually always surmountable by the enterprising potential entrant; finally, private business decisions almost always improve resource allocation, and even in the exceptional case when behavior threatens a waste of resources, there is a thin line between conduct that impairs and conduct that improves resource allocation.

C. *Preserving Competition as Process*

The third and final conception of efficiency is the traditional notion of competition as process. This conception does not presume to define desired, efficient outcomes. It does not focus on consumer surplus, marginal cost, or welfare loss. It centers, rather, on an environment that is conducive to vigorous rivalry and in turn (it is assumed), to efficiency and progressiveness.

Proponents of output-limitation theory and of autonomy theory share the value of an environment conducive to rivalry. All seek a dynamic market of efficient and flexible producers responsive to changing conditions of scarcity and consumers' changing wants. Those who stress competition process, however, reject the autonomy principle as the means to the desired end, and they reject the output-limitation formula as the exclusive or the central guide.

Thus far, this third conception describes an approach adopted by diverse thinkers who may not share assumptions about the existence or vulnerability of corporate power.[113] As this Article further defines the approach, however, proponents of the refined conception do share a series of assumptions and values that distinguish their frame of reference. Proponents place value on diversity and pluralism. They focus on preserving lower barriers to entry and greater opportunity for entry and success of unestablished firms, more than on promoting productive efficiency of established firms. They perceive that markets are inherently imperfect; producers garner and keep market power for reasons other than excellence in performance; consumers are often, within bounds, at the mercy of producers; barriers to entry and expansion in numerous markets are high and may be so maintained by threats of discipline by dominant firms; the market is often slow to discipline exploitative or marginally unresponsive established producers; and the unknown new entrant, unhoned and untraditional, is a vital source of new spirit and new progressiveness. Finally, unless antitrust law and enforcement preserves an environment that keeps markets open and fluid, private power will grow and will invite intrusive and inefficient government regulation and control.[114]

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[113] *Compare* Bock, *Concentration: Issues, Convictions and Facts—Overview* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 167, *with* Sullivan, *supra* note 1.

[114] As Dirlam and Kahn have written, "[t]his last purpose of preserving competition . . . represent[s], paradoxically, a departure from laissez faire in the ultimate interests of laissez faire." J. DIRLAM & A. KAHN, *supra* note 6, at 17.

VI

THE CHOICE AMONG EFFICIENCY APPROACHES

The three perspectives on efficiency are representative rather than inclusive.[115] They represent a range of choices for a perspective on an efficient economy. The inquiry in this section is whether any one perspective, more than others, appropriately informs antitrust policy.

First, I treat the autonomy principle. One of two prevailing contentions is that business, including business with market power, should be free to do virtually all that it wishes on the theory that business knows best how to please consumers and has the incentives to do so. This contention is based on the assumption that business firms are rational profit-maximizers—that their acts are always or virtually always efficient. The assumption is vulnerable. Business managers frequently act in order to realize personal goals, including political power or personal security within their firms, as well as to build empires.[116] Moreover, even as would-be profit-maximizers, managers are limited by the absence of full information; they make decisions on the basis of partial knowledge and intuition rather than full rationality.[117] Finally, pursuit of profit-maximizing goals by a firm with market power is inconsistent with consumers' interests in optimal output and price near costs[118]—interests that concerned the legislators far more than producers' profits or productive efficiency.[119] A view of efficiency defined by business autonomy is, accordingly, inappropriate for antitrust.

The second correlation between efficiency and autonomy is based upon political or personal desires to maximize autonomy rather than efficiency. This political strategy obviously is not an appropriate basis for antitrust economics, particularly because the political philosophy

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[115] Other perspectives on efficiency include theory based on the experience curve, a perspective that views monopoly in a specialized niche as a means to greatest efficiency, and a perspective that is based on preserving the competition process but is not further defined by assumptions that credit the existence of corporate power. For the experience curve perspective, see B. HENDERSON, ON CORPORATE STRATEGY (1979); Shapiro, *Corporate Strategy and Antitrust Policy: The Experience Curve Model,* in SHIFTING BOUNDARIES BETWEEN REGULATION AND COMPETITION: CRITERIA FOR AN ENTERPRISE SYSTEM AND THE EXPERIENCE CURVE MODEL, THE CONFERENCE BOARD, Info. Bull. No. 77, at 11 (1980). For a perspective on the competition process, see Bock, *Concentration: Issues, Convictions and Facts—Overview* in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM, *supra* note 6, at 167.

[116] O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS, ch. 2 (1975); F. Scherer, Testimony Before the Subcomm. on Monopolies and Commercial Law, Comm. on the Judiciary, House of Representatives, Sept. 23, 1981.

[117] O. WILLIAMSON, *supra* note 116.

[118] *See* section V *supra.*

[119] *See* section III *supra.*

of antitrust (distrust of power) is at war with the philosophy that accords free rein to business.

Advocates of autonomy theory combine political and economic concerns in their protest against government intervention in the context of international competition. They charge that antitrust handicaps American competitors in their quest for both efficiency[120] and power,[121] and suggest, as an antidote, autonomy. In fact, antitrust law interferes very little with courses of action that an American firm may wish to take in attempts to produce or distribute its products abroad more efficiently.[122] Antitrust does constrain the growth of

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[120] This idea is not new to the twentieth century. See Argument of James C. Carter for the Joint Traffic Association, United States v. Joint Traffic Ass'n, 171 U.S. 505, 513 (1898), in support of the railroads' claim of right to fix "reasonable" prices:

> [S]ensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves.

[121] *See* Large, General Counsel, United Technologies Corp., Merger Mini-Program, Emerging Issues with Respect to Merger Enforcement Standards, ABA Antitrust Section Annual Meeting, August 1979. Large asserts that the antitrust laws should not interfere with an American firm's acquisition of leverage and market power if "it is going to give me some more muscle so I can stay in there with my bigger competition [in international markets]." 48 ABA ANTITRUST L.J. 1655-56 (1979).

American business managers and policy makers sometimes extol the Japanese system because of the special help it offers to its nationals. The Japanese government works in cooperation with business, encourages ventures in growing markets, and allocates and coordinates investment and production opportunities. See Taber, *supra* note 9, at 52; Note, *Trustbusting in Japan: Cartels and Government-Business Cooperation,* 94 HARV. L. REV. 1064 (1981). The Japanese government also works in cooperation with declining industry. With businesses in declining industry, it derives plans as to who shall shut down how many plants and when. *See* Stokes, *Can Japan's Aid to its Industry Guide U.S.?,* N.Y. Times, Aug. 21, 1980, at D1, col. 3. The Japanese system of business/government decisionmaking by consensus appears to have worked well for Japan in the last several years, at least in high-technology industries. It is not obvious, however, that government/business cooperation in basic resource allocation decisions would work well for the United States, or indeed that the Federal Government is better equipped than American business to decide where, when, and how much to invest.

[122] Antitrust is compatible with firms' efforts to save costs in production and distribution. *See, e.g.,* E.I. du Pont de Nemours & Co. (titanium dioxide), [1980] 3 TRADE REG. REP. (CCH) ¶ 21,770 (FTC).

Only if one interprets success in foreign markets as requiring power and leverage in domestic markets can one bring aspirations of American firms for success in world markets into conflict with domestic antitrust policy.

Although muscle to compete abroad is not a recognized goal of antitrust, the United States government has been sensitive to claims by American firms that they are handicapped in their competition abroad. It has made strides both to clarify the permissiveness of the law with respect to foreign transactions, and to ease the entry of domestic firms into foreign markets. *See, e.g.,* UNITED STATES DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, Jan. 26, 1977, *reprinted in* B. FOX & E. FOX, CORPORATE ACQUISITIONS AND MERGERS, app. 15 (1981). *See also* Farnsworth, *supra* note 9, at D2, col. 1.

domestic power by means other than competition on the merits. If the claim is that American antitrust stands in the way of productive enterprise, it is contrary to fact. If the claim is that American antitrust stands in the way of market power that may be useful in the competitive race abroad, then the concern could support proposals for revision or partial repeal of the antitrust laws. It could not, however, fairly inform a definition of efficiency.

Second, should output limitation theory be the antitrust measure of efficiency? The measurement of a firm's ability and incentives to limit output does have a relationship to the consumer concerns of the antitrust laws, although more because of the distributive effect of raising price to consumers and the political effect of limiting freedom of choice than the allocative effect of wasting resources.

Where economic analysis indicates that identified behavior, such as a merger or distribution system, will lead to output restrictions by the producers in the market, the behavior is likely to restrain trade and harm the consumer interests identified above, and to be illegal under traditional antitrust principles.[123] Therefore, the economists' yardstick that measures output limitation is a helpful tool.[124]

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[123] On the other hand, a monopoly or oligopoly that can be shown to restrict output is not for that reason illegal. There is no law against oligopoly or monopoly; nor is there a law against unilateral output restriction or monopoly pricing. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980). Nonetheless, evidence of power to restrict output is relevant to alleged use of power in a manner that the law reprehends.

[124] The economic measurement of impairment of social welfare is highly theoretical and is based on assumptions that are likely to suffer from a wide range of error. First, the conclusions of any given economic exercise can tell us no more than what the economists purport to measure. The economists wish to measure the extent to which all resources in society are allocated to their best use in light of consumer demand, given the distribution of wealth. Because the enormity of such an endeavor surpasses the ability and perhaps even the imagination of the individual, economists limit their task. They attempt to measure whether more or fewer resources should be allocated to given markets in view of the supposed aggregate consumer demand for an existing product if the product were sold at cost (including a return sufficient to attract the necessary capital into the market). If producers are providing the output necessary to satisfy the consumer demand that would exist if all products were sold at cost, social welfare is deemed maximized. It is not relevant whether the producer actually sells the product at cost.

Dr. Eugene Singer, an economist, has put the welfare calculations into perspective. He notes that economists are presented "with insuperable difficulties because of the incomparability of the utilities of different individuals. There is no economic or objective solution for finding a 'bliss point' which maximizes the satisfaction of consumers." E. SINGER, ANTITRUST ECONOMICS AND LEGAL ANALYSIS 3 (1981). Economists ignore the difficulty and purport to solve the problem with a single answer as to what is "optimal." As Singer observes:

> The term "optimal" for the classical economist implied merely that the supply-and-demand equation for the economic model could be solved within their theoretical framework. It did not purport to indicate that consumers would be happy or satisfied with their level of income, standard of living, or the quality of goods and services distributed in their economy.

Id. at 2 (footnote omitted).

The theory of output limitation assumes that if producers are induced to offer the quantity of output that consumers are willing to buy at a price compensatory to the producers, consumer interests in a competitive marketplace are exhausted.[125] That assumption is not compatible with the antitrust laws. Output theory is narrow and static. It fails to reflect producers' potential to achieve lower costs or to deliver the new, the imaginative, and the yet unconceived.[126] It fails to consider opportunities for reversing an anticompetitive trend or for

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In addition to the misleading generalization of consumers' preferences, and the misleading implication that use of antitrust to maximize consumer welfare will make consumers happier, the economists' calculations depend upon many doubtful assumptions. They assume that all demand curves slope downwards (as price falls, demand and output increase), that all producers are rational profit-maximizers, that all consumers are rational utility-maximizers, and that consumers are sovereign. They assume that the market is static; as one variable changes, all else remains the same (*certeris paribus*). They take producer costs as given and make assumptions as to the reasonable rate of return to attract capital. For critical questioning of the validity of some of these assumptions, see, *e.g.*, O. WILLIAMSON, *supra* note 116; Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, and *Appendix: Definitions and Assumptions of Economic Analysis*, 12 SW. U.L. REV. 335, 361 (1981); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 456 (1974). Professor Leff writes:

> Now it must immediately be noted, and never forgotten, that these basic propositions [on demand curves and producer and consumer rationality] are really not empirical propositions at all. They are all generated by "reflection" on an "assumption" about choice under scarcity and rational maximization. While Posner states that "there is abundant evidence that theories derived from those assumptions have considerable power in predicting how people in fact behave," he cites none.

Id. at 457.

Moreover, this economic approach could present insuperable burdens for an enforcer. As to business firms' range of discretion in calculating profits, see E. SINGER, *supra*, at 7. As to power of firms to manipulate costs, see Transamerica Computer Co. v. IBM Corp., 481 F. Supp. 965 (N.D. Cal. 1979) (by allocating fixed costs in proportion to sales revenues, IBM could engage in low-price competition against a new entrant without falling below marginal cost; every time it dropped its price, it automatically lowered its allocated costs).

[125] Professor Warren Schwartz asserts that the only reason that consumer damage actions focus on the overcharge (*i.e.*, the distributive consequences) depicted by the wealth-transfer rectangle, *see* text at note 92 *supra*, is "the empirical difficulty" in identifying the victims of the harm reflected by the welfare triangle. W. Schwartz, *supra* note 91, at 1084.

To the contrary, the reason why consumer damage actions focus on the wealth transfer and not the welfare triangle is that Congress cared centrally about the distributive effect. Congress was concerned with business' profiteering at the expense of the consumer. *See* note * *supra*. As the Supreme Court correctly observed in upholding the right of a consumer to damages for overcharge, "[c]ertainly the leading proponents of the legislation perceived the treble-damages remedy of what is now § 4 as a means of protecting consumers from overcharges resulting from price-fixing." Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). Thus, the antitrnst laws do incorporate distributional and other equity values. Recognition of this reality destroys the basic premise of those who claim that antitrust has allocative purposes only.

[126] *See generally* W. BAXTER, P. COOTNER & K. SCOTT, *supra* note 86. Baxter, Cootner, and Scott identify resource loss caused by impairment of the incentive to innovate as one of the two types of social loss from decreased competition. The other loss is the static dead weight loss. They argue persuasively that loss of potential innovation is likely to be far more important than

inviting untested competition at the margins. It fails to capture individuality of producers and consumers or to grasp the dynamic qualities of an open enterprise system.[127]

The point is not that welfare economics ignores strategic behavior and long-run effects. Some economists do, and some do not.[128] The point is that all welfare analysis is narrowly confined to one question: Will producers limit output and thereby "waste" society's resources? This is not the central question of antitrust.[129]

Finally, should efficiency as a goal of antitrust be conceived in terms of protection of the competition process? This Article contends that protecting the process of competition among a significant number of rivals in free and open markets, with special regard for long-run

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failure to realize all significant scale economies, because technological change may cause costs to fall at every level of scale. *Id.* at 84-86. Baxter, Cootner, and Scott suggest a method for taking into account incentives to invent and for regarding "technological change . . . as being fully as important as [dead weight loss and scale economies]." *Id.* at 86 (discussing the electronic funds transfer market).

[127] Professors Dirlam and Kahn comment on the limits of output theory as follows:

> The only alternatives customers know are those that have been presented to them by the same accustomed patterns of business structure and behavior. Here public policy may defy the economists. The latter have shown a tendency in recent years to worry only about the power that is a power to increase prices; but there are other forms of economic power about which the community may legitimately be concerned. Economists have also shown a strong tendency to define welfare in terms of efficiency in doing accustomed things in an accustomed way, to define competition in terms of the forms it takes today, and to insist that those are the only possible goals, practices, and forms even though the community may find some of them socially unacceptable.

J. DIRLAM & A. KAHN, *supra* note 6, at 14.

In United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court, by Justice Brennan, likewise identified economic goals and concerns not captured by output theory:

> At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation.

Id. at 372.

[128] *See* FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS, BUREAU OF COMPETITION, STRATEGY, PREDATION, AND ANTITRUST ANALYSIS (S. Salop ed. 1981).

[129] See Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 466 (1941):

> Petitioners . . . argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the types of conduct banned by the Sherman and Clayton Acts.

A recent expression of the view "that the antitrust laws were designed to protect competition, not solely to improve allocative efficiency," appears in William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 1981-2 Trade Cas. ¶ 64,229, at 73,909 (9th Cir. 1981).

consumer interests,[130] is the most appropriate focus for antitrust economics.

I do not claim that protection of the process is the only means or the obviously superior route to greatest efficiency or happiest consumers. None of the perspectives on antitrust and efficiency can fairly present itself as the one right answer, in terms of greatest efficiency alone. All of the perspectives rely on assumptions and even articles of faith. I make, rather, a limited claim: The traditional antitrust focus on process, revised to eliminate any tilt towards small size for its own sake, should be retained for historical, social, and pragmatic reasons. First, this perspective has worked reasonably well in keeping markets open to competition on the merits and thus to creating an environment conducive to efficient performance; no other system promises to work better. Second, it is rooted in tradition, which produces continuity and thus relative certainty in enforcement of and compliance with the antitrust rule of law. Third, it is the one accepted economic perspective that harmonizes with the dominant non-efficiency values of antitrust. Finally, although reaffirmation of the traditional focus does involve some selection among economic modes of thinking, this focus has been deeply ingrained in antitrust for nearly a century, and it provides an open and flexible framework that does not lock the law into a closed, theoretical, economic construct.

Critics would abandon tradition and embrace either theoretical welfare economics or producer autonomy on grounds that the system fails to take sufficient account of the interests of American consumers in lower prices and better products, the interests of American producers in excelling in world markets, and a national political interest in reestablishing America as the major economic power in the world.

The critics' argument rests on the view that antitrust protects inefficiencies and aborts transactions that capture cost-savings and

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[130] For purposes of the limiting principle, antitrust enforcement is deemed harmful to consumer interests if enforcement deprives consumers or intermediate buyers of lower priced options or prevents business activity that is reasonably necessary or important to get goods or services to market. Antitrust enforcement is not regarded as harming consumer interests merely because it prevents producers from realizing a profit opportunity and thereby frees some resources for an alternative use. Many economists argue that such lost benefits constitute a serious welfare loss to society and that the antitrust laws should not be applied when a net welfare loss is threatened. *E.g.*, W. Baxter, P. Cootner & K. Scott, *supra* note 86. In contrast, this Article argues that such a supposed welfare loss cannot be added to the concerns of antitrust without eroding antitrust; that calculations of such a loss are illusory because they may be offset by technology gains developed by any one of a number of siguificant rivals; that resource waste from regulatory laws dwarfs the possible resource loss from antitrust enforcement; and finally, aware that some otherwise unnecessary use of resources is inherent in a competition system, we nonetheless have chosen such a system.

thereby harms the consumer, impedes the producer, and weakens the economic performance of American firms. The criticism has a genesis in rigidities in the law implanted by Supreme Court opinions of the 1960s and early 1970s. These opinions glorified small size and they created inflexible per se rules, which may have diverted efficient activity. The criticism, however, does not lead inexorably to a proposal to discard traditional focus on process.[131] Rather, it supports a plan for the modernization of antitrust through change at the margins. It supports a design to build into the system a proper regard for long-run consumer interests and a proper respect for producer autonomy. Such change is in progress.

VII

The Place of Efficiency in the Law of Antitrust

A. *Introduction*

This section examines whether efficiency should be the only value that informs antitrust law, and, if not, what other values should be incorporated and in what ways. An array of scholars has examined the place of efficiency in the scheme of antitrust. They have offered a variety of proposals. I first present a representative spectrum of approaches taken by individuals who have thought deeply about the problem. I do so both to demonstrate the variety of perspectives and to suggest possibilities for resolution.

Professor Bork argues that antitrust does and should exist only to promote efficiency and thus enhance consumer welfare. He argues that irrational, careless, or biased Justices have diverted the law from this one, clear goal.[132] Although Professor Bork insists that he would

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[131] Overhauling the existing antitrust system would itself produce inefficiency. *See* McChesney, *On the Economics of Antitrust Enforcement,* 68 Geo. L.J. 1103 (1980). McChesney writes:

> Businessmen could not know (even if lawyers and economists were sure) which sorts of structure, conduct, and performance ultimately would be deemed efficient and therefore legal. For this reason, the sudden adoption of an efficiency criterion might only create inefficiency, the uncertainty costs swamping the benefits of change.

Id. at 1104 (footnote omitted). McChesney observes that if antitrust principles frustrate certain efficient behavior, producers and consumers will adapt to the rules by substituting legal behavior that is efficient. For example, a business might form a legal joint venture to accomplish what could not legally have been done by merger. "Consequently, the gains from altering the existing law often diminish over time as substitutes for inefficient rules are discovered and employed." *Id.* at 1105 n.12.

[132] R. Bork, *supra* note 13, at 108-09.

apply antitrust only to advance consumer welfare, the assertion may mislead, for Professor Bork does not use the expression "consumer welfare" as welfare economics defines that phrase. Bork proclaims that what is good for big business is good for the consumer, and his solution is to give maximum autonomy to private business.[133]

Professor Posner argues that antitrust does and should exist only to promote efficiency and thus maximize the wealth of the nation. He regards collusion among competitors in concentrated markets as the only real obstacle to wealth-maximization, and he would use antitrust solely to prevent collusion of oligopolists.[134]

Professors Areeda and Turner likewise would limit antitrust to their concept of efficiency and progressiveness. They regard the consumer as the one intended beneficiary of efficiency. They worry about persistent noncompetitive market structures and aim to enhance competition and promote consumer interests over the long run,[135] although sometimes they accept a short-run view as the best proxy for the long run.[136] They take a more open view of consumer interests than does Posner and generally do not limit themselves to theoretical, static models. Faced with the choice between protecting a monopoly firm's incentives to innovate and protecting smaller competitors' opportunities to compete, however, they opt for the former on the theory or instinct that their choice best serves consumers.[137]

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[133] *See id.* at 90-98. Professor Gellhorn reveals the normative judgments inherent in Professor Bork's approach:

> What Bork seems to have implicitly conceded by his proposed horizontal merger rule, then, is that efficiency cannot always be the only standard and that in developing policy where economic theory and data are uncertain some assumptions may have to be made and some legal presumptions may be usefully employed.
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> . . . What normative values did he rely on to reach his judgment [that mergers up to 60 or 70 percent of the market should be permitted? T]o do nothing now is to make a policy decision and suggests to me that Bork's proposed rule is aimed at preserving a semblance of the status quo pending further data.

Gellhorn, Book Review, 92 HARV. L. REV. 1376, 1387-88 (1979) (reviewing R. BORK, THE ANTITRUST PARADOX).

[134] R. POSNER, *supra* note 13, at 39-77, 212.

[135] *See* 1 P. AREEDA & D. TURNER, *supra* note 12, chs. 1, 4.

[136] Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697, 706-07 (1975); *see* Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 HARV. L. REV. 868 (1976); Scherer, *Some Last Words on Predatory Pricing,* 89 HARV. L. REV. 901 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 YALE L.J. 284 (1977); Williamson, *Williamson on Predatory Pricing II,* 88 YALE L.J. 1183 (1979). *But see* Areeda & Turner, *Predatory Pricing: A Rejoinder,* 88 YALE L.J. 1641 (1979); Areeda & Turner, *Scherer on Predatory Pricing: A Reply,* 89 HARV. L. REV. 891 (1976).

[137] *See* 3 P. AREEDA & D. TURNER, *supra* note 12, ¶¶ 626(b), 706(b), 722; Turner, *Technological Innovations By a Dominant Firm,* in ANTITRUST: A BLUEPRINT FOR THE 80's (Fourteenth New England Antitrust Conference, Mass. CLE-N. Eng. Law Institute, Inc. 1980).

Professor Sullivan takes a multivalued view of antitrust. He respects efficiency, and he respects the variety of interests of consumers, including the distributive effects of bringing price toward costs.[138] Professor Sullivan's "eclectic" view of antitrust rests on consumer concerns, humanistic concerns, the distrust of power, and the demands of the common law tradition to impose order on chaos.[139]

Other scholars warn that efficiency should not eclipse dominant non-economic goals of antitrust. The same individuals, however, are convinced that enforcement of antitrust to decentralize power and to promote justice will benefit the consumer and tend to increase the satisfaction of individuals in society. Professor Louis Schwartz has documented the ways in which certain antitrust laws and related legislation and government action were designed "to create alternative centers of power that could not readily be marshalled behind authoritarian regimes," and to promote " 'justice,' in the sense of fair and equal treatment of persons in like situations."[140] Professor Flynn has challenged formulas for efficiency as delusive and misleading; they are, he argues, shallow measurements of what can be measured only because what should be measured defies measurement.[141]

This Article rejects the view that antitrust should be confined to efficiency objectives. That view runs counter to the language of the statutes, to the history of those statutes, and to the developed decisional law. If it is feasible, antitrust should reflect in a meaningful way

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[138] *See* Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships,* 68 CALIF. L. REV. 1, 10 (1980); Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason,* 27 U.C.L.A. L. REV. 265, 332 (1979).

Professor Sullivan would place qualified reliance on economics. He would not rely on static price theory as the tool to derive solutions to antitrust problems. Nor does he believe that efficient resource allocation is or should be the goal of antitrust. He asserts:

> Thinking and writing about the law as though rational resource allocation were the only goal can only lead to confusion.
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> . . . Antitrust, indeed, is founded on a populist tradition, a tradition quite at odds with the scientific rationality that informs economic theory [.] . . . [T]hat tradition . . . makes its own legitimate claim on judicial attention and, viewed quite pragmatically, has its effects on the developing law which the lawyer cannot ignore even if the economist can or must.

L. SULLIVAN, *supra* note 76, at 11.

[139] L. SULLIVAN, *supra* note 76, at 10-11.

[140] L. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust, supra* note 1, at 1078.

[141] Flynn, *supra* note 124. Professors Schwartz and Flynn see antitrust as a body of law designed to promote economic justice, fairness, and opportunity. *Id.;* L. Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises, supra* note 1; L. Schwartz, *"Justice" and Other Non-Eeonomic Goals of Antitrust, supra* note 1; L. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness, supra* note 1.

all of its basic goals, including power dispersion, competitive opportunity, and long-run consumer satisfaction. The two strongest arguments offered against incorporation of non-efficiency values are, first, that any use of non-efficiency values tends to impair efficiency, and, second, that the non-efficiency values cannot rationally be incorporated into relatively clear and reliable principles of antitrust law.

Proponents of the first claim regard virtually all business behavior other than collusion among oligopolists as neutral or procompetitive. They believe private investment decisions tend to maximize allocative efficiency, and virtually any constraint that diverts the flow of resources from the privately-conceived "best" use is destructive of allocative efficiency. One who holds this perspective and who prefers efficiency to all other antitrust values will resist incorporation of non-efficiency values, as I have explained above.[142]

The claim that non-efficiency values cannot be rationally incorporated into law is weak. The burden of the following section is that: (1) Non-efficiency values are already incorporated into antitrust principles in measureable ways, although there has been some flux in recent years as the law moves to a new equilibrium. (2) An attempt to wrench the non-efficiency values out of the antitrust law after nearly a century of integration would be much more destructive to the antitrust rule of law than would a continued respect for stare decisis with changes at the margin to protect consumers' interests. (3) There is an appropriate framework for analysis to aid the movement toward the new equilibrium.

B. *An Approach*

The framework for the new equilibrium requires a synthesis of four concepts: (1) the centrality of the competition process; (2) the use of economics to promote the competition process; (3) the harmonious integration of converging efficiency and non-efficiency goals; and (4) use of consumers' interests as a trump over goals that conflict.

The central component of this synthesizing view is the competition process. The process presupposes dynamic interaction among firms that are both flexible and adaptable to changing desires and needs. It presupposes an environment conducive to entry, survival, and success.[143] Of more importance, this conception rejects the as-

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[142] *See* text at section VI *supra*.

[143] *See* 1 P. AREEDA & D. TURNER, *supra* note 12; B. KLEIN, *supra* note 72.

The competition fostered by antitrust law has strong roots in a notion of freedom of trade. If every trader's freedom is preserved, then the flexibility of each trader to meet consumer sumption that, absent government interference, competition is virtually always robust and the best will win. It operates on the assumption that established firms tend to garner the power to place roadblocks before their competitors and to perpetuate success for reasons other than merits. For this reason, the concept focuses on preserving opportunities at the margin for firms without market power, more than promoting opportunities for cost-savings for firms with market power,[144] but it facilitates both.

Given this context, we must define the linkage between efficiency, economics, and antitrust policy. "Efficiency" is not an ultimate goal. It is an intermediate goal pursued in order to facilitate freedom of choice, to serve other interests of consumers, and to make the best use of society's resources. Economics provides useful tools to achieve solutions that promote or harmonize with efficiency.

Efficiency frequently corresponds directly with promotion of the competition process and with developed antitrust case law. The correlation is particularly clear in the law directed against the growth, use, and effects of market power.[145] The tools of economics can be employed most usefully in such cases. For example, economic analysis can appropriately be used as a guide and as supporting authority in cases challenging monopolization and attempts to monopolize,[146] oli-

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wants in its own way is maximized, and the public gets "whatever advantage may be derived from competition in the subsequent traffic." Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 409 (1911); *see* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

It is seldom clear beforehand what this freedom will bring. But the theory of free competition does not demand proof that long-term gains will exceed short-term losses. Rather, it carries the presumption that competition is in the public interest and will advance the public good. *See* Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949).

The Supreme Court has drawn an analogy between free competition and free speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc., 425 U.S. 748 (1976). The law protecting speech does not promote good speech and bottle up bad speech. Rather, it facilitates the flow of speech. It focuses concern on process, not outcome, with the conviction that process is vital in its own right, that its protection will bring about the most acceptable and desirable results, and that the process is self-correcting in the long run.

[144] Like democracy, competition is a process designed to aid no one in particular. It does not promote any set of subjective moral values except those values that put the process in place. It will sometimes have harsh results, but, on balance, compared with the alternatives, it best promotes the public good. *Cf.* J. Ely, Democracy and Distrust (1980).

The antitrust process would not favor small businesses, although inefficient, for moral reasons. *Cf.* United States v. Aluminum Co. of America, 377 U.S. 271 (1964). Nor would it protect monopoly, although inefficient, for moral reasons.

[145] *See, e.g.,* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370-71 (1962); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[146] 1 P. Areeda & D. Turner, *supra* note 12; R. Posner, *supra* note 13; F. Scherer, *supra* note 46.

gopolists' collusion,[147] mergers that threaten to create power over price and output,[148] and manufacturers' restraints on resellers' customers and territories.[149]

In other areas, rights and principles that have a less obvious connection with consumer benefit are deeply embedded in antitrust law and heritage. This category includes many mergers prohibited by the merger law.[150] It includes applications of the per se rule against tying arrangements,[151] classic group boycotts of single victims,[152] vertical price-fixing,[153] horizontal price-fixing in fragmented markets,[154] and market divisions among small firms.[155] The category prominently includes the access cases, which give firms a limited right of access to scarce but vital facilities and sources of supply[156] and a right

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[147] We can and should learn from economics; which could, for example, advance the law's capability of dealing with oligopolistic interdependence. *See* Nye, *Can Conduct-Oriented Enforcement Inhibit Conscious Parallelism?*, ANTITRUST & TRADE REG. REP. (BNA) E-1 (Mar. 4, 1975); Shenefield, *Antitrust Division Memorandum on Identification and Challenge of Parallel Pricing Practices in Concentrated Industries*, ANTITRUST & TRADE REG. REP. (BNA) F-1 (July 27, 1978).

[148] 4 P. AREEDA & D. TURNER, *supra* note 12; R. POSNER, *supra* note 13; F. SCHERER, *supra* note 46.

[149] In the area of distributional restraints, the Supreme Court moved from a business freedom principle to an efficiency principle in 1977. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Justice White stated in concurrence:

> [W]hile according some weight to the businessman's interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply embedded in our cases than the notion of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships."

Id. at 68-69 (footnote omitted).

I accept the outcome of the *GTE Sylvania* case and its overruling of *Schwinn*'s broad and absolutist free-trader principle as a starting point for my proposal. The holding of *GTE Sylvania* is correct because, in that case, per se application of the antitrust laws against Sylvania would have deprived a firm without market power of basic distributional efficiencies, and thus would have deprived the consumer of a more effective competitor.

[150] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962); *see* L. SULLIVAN, *supra* note 76, at 596-97.

[151] *See* International Salt Co., Inc. v. United States, 332 U.S. 392 (1947).

[152] In Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), a boycott against a retail competitor was held illegal per se, although it was conceded that there was no harm to competition. The Solicitor General argued, in the amicus brief of the United States in favor of plaintiff Klor's, that the antitrust laws protect a victim against a group boycott even if the injury to the victim's competitive position does not cause "other measurable injuries to the public interest." Brief for the United States at 8, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[153] *See* Albrecht v. Herald Co., 390 U.S. 145 (1968).

[154] *See* United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 224 n.59 (1940).

[155] *See* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

[156] The right is subject to a business justification defense. For example, a producer would not ordinarily have a duty to grant access if its facilities cannot accommodate another user. *Cf.*

not to be fenced out of any substantial market by the leverage of a better situated competitor.[157]

The bases of these rights are varied. They reflect concerns for fairness, opportunity, and autonomy for sellers without power. They reflect also the concern that individuals in a democratic society should be relatively free from great aggregations of power, lest those centers of power, however benign and progressive today, exploit them economically or control them politically tomorrow. Moreover, every one of these rights has a connection with an interest of consumers,[158] even though that connection would be disputed by those who believe that the market always rewards merit. Each one of the principles fits into a vision of a free and open market, wherein opportunity for producers without power correlates with interests of consumers in diversity, choice, and the new invention by the maverick who may revolutionize the industry.

I make the following proposal. Antitrust should serve consumers' interests and should also serve other, established, non-conflicting objectives. There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor. A fifth possible goal of antitrust is the preservation of small size for its own sake. Because of the unusual potential for conflict between this objective and consumers' interests, I do not propose incorporation of this goal into antitrust policy. A sixth possible goal, justice, is vague in conception and is in fact a by-product of several more specific goals. I therefore do not treat this value separately.

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Associated Press v. United States, 326 U.S. 1 (1945).

[157] *See* Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972), *aff'g* 286 F. Supp. 407 (D. Mich. 1968), holding Ford's acquisitions of assets of a major spark plug manufacturer illegal. The district court observed, "[W]hat hurts is that the opportunity to try [to supply Ford's needs] has been taken away." 286 F. Supp. at 442 (footnote omitted). *See also* FTC v. Texaco, Inc. 393 U.S. 223 (1968); Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 323-24 (1962); Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949); International Salt Co., Inc. v. United States, 332 U.S. 392 (1947).

[158] For example, the principle against tie-ins may keep entry barriers lower and thereby facilitate checks on market power in concentrated markets.

The fact that an antitrust principle may produce efficiency benefits does not mean that efficiency is the center of antitrust policy. It merely reinforces the premise that efficiency is one of the probable results of preservation of the competition process.

My proposal is that when developed principles of antitrust serve one of the four basic historical goals of antitrust and do not threaten increased costs to consumers over the long run, stare decisis should be respected by the courts.[159] However, long-run consumer interests should be a limiting principle. Antitrust should not be applied in ways likely to harm consumers over the long run.[160]

In cases of hard-core violations, such as horizontal price-fixing and market divisions, the limiting principle would not come into play. Freedom to decide what and how much to produce, and where, to whom,[161] and at what price to sell, is central to the nervous system of markets and therefore to long-run consumers' interests. No defense of

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[159] If each principle of antitrust law were reexamined and reshaped to advance economists' views of efficiency, then all antitrust cases would tend to rise to the complexity of monopoly cases. Particularly when developed antitrust law is based on sound policy consistent with the goals underlying the law and not obviously inconsistent with long-run consumer interests, it would be unwise to invite the battles of economic experts.

See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979) regarding the complexity of the monopoly case. See also Loescher, *Limiting Corporate Power,* 13 J. OF ECON. ISSUES 557 (1979), warning of problems of both bias and attenuation inherent in litigating the question of firm efficiencies:

> Available comparative cost and performance data are notoriously unobjective, for most are provided by the very firms to be dissolved. Frank Kottke warns us that defendant firms probably will selectively control the release of information in a partisan fashion, while Oliver Williamson reminds us that such vigorously partisan behavior is fully legitimated by the advocacy process.

Id. at 558 (footnotes omitted).

[160] By this standard, I would disapprove of the language, and therefore, in part, the result, of Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962). In *Brown Shoe,* Chief Justice Warren addressed the cost-saving aspects of the vertical integration of a shoe manufacturer and retailer:

> [W]e cannot fail to recoguize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Id. at 344.

Chief Justice Warren's language is faithful to the legislative history. In light of the language of the statute, however, which is phrased in terms of "competition" and not decentralization, and in light of the need to protect consumers against increased costs, the broad sweep of the language is no longer acceptable.

[161] The freedom to decide where and to whom to sell is, of course, qualified in the case of vertical relationships by the principles set forth in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

efficiency would be allowed. So, too, there would be no change in the established per se rule against classic group boycotts, which protects economic opportunity and freedom to compete on the merits, because enforcement of the rule causes no harm to consumers.

Other per se principles could be candidates for challenge as inconsistent with consumer interests. These include the rules of law that prohibit maximum vertical price-fixing, minimum vertical price-fixing, especially in fragmented markets by producers without market power, and tying arrangements in which the tie does not endanger price or quality of the goods in the market for the tied product. A successful challenger would be required to demonstrate that application of the per se rule harms long-run consumer interests viewed from a perspective harmonious with the proposed conception of competition process. For example, if composers of music must pool their compositions in order to provide an efficient system of delivery to broadcast users, per se invalidity would impose obvious harm on buyers and would thus be unacceptable.[162] Therefore, if existing interpretations characterized such pooling of product by competitors as per se illegal, those interpretations would be overturned.

Imposition of such a burden on one who wishes to challenge established law is appropriate because the current prohibitions of the law serve traditional antitrust values apart from deterrence of monopolies and cartels. For example, the per se rule against certain tie-ins reflects the value that producers should not be deprived of the right to compete on the merits for any significant amount of business, as well as the value of consumer choice. The per se rule against vertical price-fixing reflects the value that sellers of goods should have the freedom to charge the price they see fit,[163] as well as the broader economic judgment that markets work better when the individuals closest to the pulse of the market transaction have the flexibility to determine price.

Moreover, virtually all of the per se rules reflect a perceived need for a prophylactic effect. Even consumer-based per se rules are more inclusive than necessary to protect consumers against clearly anticompetitive conduct. The breadth of the rules is commonly justifiable by their deterrent force, their contribution to the efficiency of enforcement, and their contribution to the efficiency of business decisionmak-

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[162] See discussion of Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), in note 183 *infra*.

[163] *But cf.* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

ing geared toward compliance. Accordingly, my proposal would retain a per se rule against behavior in clearly defined categories where (1) it is difficult to distinguish between restraints in the category that are anticompetitive and threaten harm to consumers, and those that are neutral or potentially beneficial; (2) it is important to prohibit and effectively deter the harmful restraints; and (3) there is little likelihood of loss to buyers of the product in question from overdeterrence. The flat prohibition against all cartel activities, even those such as specialization agreements that could save resources, falls within this characterization.

In the case of activity not per se illegal under existing law, evidence of efficiency currently comes into the litigation, usually to support a defendant's claims that the challenged activity does or will improve its performance, render the market more competitive, and benefit consumers. The limiting principle concerns the weight and respect to be given to the evidence of efficiency. Courts do and should take seriously credible evidence that particular antitrust enforcement is likely to lead to the long-run detriment of users of the product in question. If enforcement would deprive consumers of the benefits of competition, such as the benefit of an important consumer option,[164] the defendant should prevail.

Within a broad area, consumer and non-consumer values are compatible and mutually reinforcing, and I conceive of the limiting principle not as a harbinger of a rewritten law but as a safety valve to guarantee sufficient flexibility to protect consumers from unnecessarily increased costs or decreased options. In the following paragraphs, to demonstrate the high degree of harmony of values, I describe and suggest appropriate integration of the non-efficiency aspects of power dispersion and opportunity.[165]

1. *Power Dispersion and Consumer Interests*

Power dispersion has particular relevance in monopoly cases under section 2 of the Sherman Act and merger cases under section 7

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[164] On remand in the *Sylvania* case, for example, the court found that Sylvania's location clause improved Sylvania's effectiveness and increased interbrand competition. Continental T.V., Inc. v. GTE Sylvania Inc., 461 F. Supp. 1046 (N.D. Cal. 1978). Thus, enforcement would have deprived consumers of the benefits of competition.

[165] These objectives have inseparable economic components. By one accepted economic perspective, dispersion of economic power and preservation of freedom and incentives to enter and succeed in markets best serve consumers in the long run. *See, e.g.*, F. SCHERER, *supra* note 46. *See also* J. DIRLAM & A. KAHN, *supra* note 6; C. KAYSEN & D. TURNER, *supra* note 76; B. KLEIN, *supra* note 72.

of the Clayton Act. For purposes of the monopoly law, power dispersion as a socio-political goal coincides with efficiency and other consumer concerns.[166] Consumer interests, like the nonconsumer social concerns, lie against monopoly prices and favor greater output and diversity of products and sources. The non-economic concern is not a conflicting political value to be reckoned with. It neither requires nor contemplates atomization of a monopolist into units too small to achieve economies of scale. It does not mandate break-ups where the forces of competition can be introduced through less drastic means. Like the consumer concern, the socio-political values tend to favor dissipation of substantial, persistent monopoly, but not in ways that harm the consumer.

The dilemma in monopoly law comes not from a conflict between the economic and non-economic goals of antitrust, but from very different tensions. A tension exists between equity for the good monopolist and efficiency for the consumer. There is tension between consumer interest against dead weight loss in a particular market and general consumer interest in preservation of incentives to business to strive to be the best. In addition, there is hesitancy to interfere with a system that works, for a predicted but not certain consumer gain. Given these tensions and uncertainties, the monopoly law has been molded more by notions of fairness (to the good monopolist) than by either economics or populism. The culpable monopolist is subject to break-up without necessary inquiry into possible loss of efficiencies.[167] The monopolist that has not been culpable is legitimized.[168]

How courts interpreting the monopoly law should account for the potentially conflicting interests in low price, diversity of product and source, and progressiveness is not free from doubt. Current law respects freedom of a firm to grow to monopoly proportions and to retain monopoly power achieved through competitive merits, in view of the desire to preserve incentives to be the best and in spite of possible monopoly pricing. The battleground centers on characterization of behavior of a monopoly-sized firm as abusive or competitive. The development of law in this area can and should be informed by

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[166] *See* Fox, *Monopoly and Competition: Tilting the Law Towards a More Competitive Economy*, 37 WASH. & LEE L. REV. 49 (1980). *See also Transcript of Hearings Before the National Commission for the Review of Antitrust Laws and Procedures*, Sept. 13, 1978, Oct. 17, 1978.

[167] *See, e.g.*, United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968); United States v. Grinnell Corp., 384 U.S. 563 (1966); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[168] *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Monopoly pricing is not deemed culpable, even though it is an indicator of restricted output. *Id.*

compatible notions of efficiency and diversity: a tilt at the margin toward protecting opportunities for efficient challengers of the dominant firm.[169]

Merger law and power dispersion have a somewhat different relationship. Three factors are relevant. First, power dispersion was a basic, articulated reason for the enactment of the Celler-Kefauver Amendment to section 7 of the Clayton Act.[170] Therefore, the claim that power dispersion should inform the merger law is strong. Second, application of the merger law does not create power dispersion or atomization. It merely preserves an existing dispersion of power. Therefore, the merger law cannot fairly be charged with destroying existing efficiencies. Third, in merger cases, power dispersion itself does not necessarily correlate with consumer benefit. At the extreme, power dispersion could conflict with consumer interests. There is an intimation in merger opinions of the 1960s and early 1970s that mergers might appropriately be banned merely to satisfy nostalgic yearnings for a society of many small units, even if consumers suffer a loss.[171]

Under the proposal offered here, the power dispersion goal would continue to inform merger policy in ways that do not threaten harm to the consumer over the long run. In substantial horizontal merger cases such as *United States v. Philadelphia National Bank,*[172] the power dispersion goal should bolster significantly the economic presumption that creation or increase of oligopoly power is harmful to consumers. Even when market shares of merging firms are less substantial than in *Philadelphia National Bank,* the power dispersion goal should support the weaker economic inference that a trend toward market power is potentially harmful to consumers.[173]

In merger cases, the value against centralized power should be credited in its own right. If, however, a merger promises productive efficiencies to firms in a fragmented market not threatened with the creation of market power, and market forces are likely to cause the cost savings to be passed on to the consumer, it would be unwise to use a power-dispersion goal to justify invalidation of the merger, and

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[169] The author has addressed the subject elsewhere, using a framework in which consumer and other values are compatible. Fox, *supra* note 166.

[170] *See* notes 54-60 and accompanying text *supra.*

[171] *See, e.g.,* United States v. Von's Grocery Co., 384 U.S. 270, 281 (1966) (Stewart J., dissenting).

[172] 374 U.S. 321 (1963).

[173] *See* Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979). *See also* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226 (1960).

it would be perverse to use the achievement of cost savings as the reason for invalidation.[174]

2. *Entrepreneurial Opportunity and Consumer Interests*

Like power dispersion, entrepreneurial opportunity informs interpretations of the Sherman and the Clayton Acts, and would continue to do so under my proposal. The Sherman Act prohibition against concerted boycotts of single victims and the prohibition against certain tie-ins are illustrative.

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[175] Klor's, the operator of a retail store, was a victim of a concerted refusal to sell electrical appliances. Hundreds of other retail stores in the vicinity offered the merchandise of the boycotting manufacturers. Thus, the elimination of Klor's as a retailer of those goods did not perceptibly affect consumer choice or the vigor of competition in electrical appliances. The district court dismissed the case, and the court of appeals affirmed on the ground that the boycott had caused no public injury.[176] The Supreme Court reversed, holding that the injury to Klor's alone was sufficient to sustain the violation. The boycott deprived Klor's of a fair opportunity to compete on the merits. The principle protecting

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[174] In Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962), the Supreme Court held illegal the acquisition by Brown Shoe Company, a manufacturer and retailer of shoes, of G.R. Kinney Company, also a manufacturer and retailer of shoes, on grounds of both horizontal and vertical effects. The market shares involved were small. Brown Shoe manufactured 4% of all of the nation's shoes, and Kinney manufactured 0.5% of all of the nation's shoes. In a great many cities in which the two firms competed at the retail level, their combined market share was less than 5%, although in a handful of cities their combined share of retail shoe sales was quite high. The Court considered, among other things, that the combined firm was now a large chain, and "the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories." *Id.* at 344. Further, the Court said: "The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers." *Id.*

In an article criticizing the Court's resolution of the efficiency issue in *Brown Shoe*, Professors Blake and Jones observe that the government had argued that the combination "was a menace to competition because the integrated company would have been more efficient." Brown's counsel "found himself in the incomprehensible position of arguing that the merger produced no such economies or likelihood of benefit to the consumer." The Court "agreed with the Government both on the facts and on the law: that the merger would result in improved efficiency and that this improvement supported its finding that the merger was unlawful." Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 456-57 (1965) (footnotes omitted). *Brown Shoe* is thus a classic case for protection of competitors, despite language in the case to the contrary.

[175] 359 U.S. 207 (1959).

[176] 255 F.2d 214 (9th Cir. 1958).

Klor's opportunity to compete coincides with the principle of keeping markets free and open, and does not threaten harm to consumers. Therefore, it would be preserved under the proposal.

The tie-in case law also protects fair opportunity to compete on the merits, and much of the law is not based upon harm to consumers' interests. *International Salt Co., Inc. v. United States*[177] is an example. International Salt made patented salt machines and required that its lessees buy from it the salt to be used in the machines. If, however, a competitor offered salt at lower than the contract price, International Salt's customer had the right to buy the salt from the competitor or to pay the lower price to International Salt. The tied salt represented a substantial dollar volume of business, although apparently not a significant percentage of the salt market. On these facts, the tie was held illegal. The Court protected the right of competing salt sellers to an equal chance to compete on the merits. "[I]t is unreasonable, *per se,*" said the Court, "to foreclose competitors from any substantial market [by use of leverage]."[178]

In *International Salt,* unlike *Klor's,* possible efficiency claims may be asserted.[179] Some economists argue that tying may be conducive to efficiency in the market of the tying product and should be allowed unless it provably harms competition (*e.g.,* by restricting output) in the market for the tied product.[180] When a firm with market power over a tying product forces a tie, however, the efficiency claims in support of tying are not obviously more weighty than the efficiency claims against tying.[181] Although economics provide no clear answer, traditional antitrust values that protect access to markets on the basis of merits, not leverage, are exceedingly strong. Therefore, the proposal would preserve the prohibition against unjustified tying by firms

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177 332 U.S. 392 (1947).

178 *Id.* at 396.

179 Tying can result in realization of distribution economies through sales of related goods to the same customers. Also, a seller may employ tying as a device to maximize revenues by charging a higher price to the more intense users. In addition, tying can aid the seller in extracting the maximum return from buyers of complementary products. *See* F. SCHERER *supra* note 46. Tying also can facilitate entry and protect the quality of the tying product; however, if it is necessary to accomplish either, tying is justified and not illegal. *See, e.g.,* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

180 *See, e.g.,* R. POSNER, *supra* note 13, at 171-84; Bowman, *Tying Arrangements and the Leverage Problem,* 67 YALE L.J. 19 (1957).

181 *See* Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis,* 33 VAND. L. REV. 283 (1980). See also the analysis of Justice White, joined by Justice Harlan, in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 510 (1969) (dissenting on the ground that the plaintiff should have been required to prove market power over the tying product).

with market power over the tying product,[182] unless the case is made that applications of the rule deprive consumers of a lower price, better quality, or a new alternative.

CONCLUSION

Antitrust law and policy is at the heart of a storm of criticism leveled against government regulation. Detractors' major claim is that antitrust impairs efficiency and harms consumers. Critics would drastically curtail the scope of the law by eliminating the non-efficiency values and by limiting the efficiency goals of antitrust.

I have attempted to demonstrate that there are many ways of conceiving of efficiency and of an antitrust system most likely to produce it, that the central non-efficiency values of the Sherman and Clayton Antitrust Acts are compatible with their efficiency goals, and that the Sherman and Clayton Acts can and should be modernized to meet the major criticism by changes at the margin to assure protection of the interests of consumers.

My proposal contains three parts. First, I would take the current state of the law as given and assume the correctness of the outcomes of all of the antitrust decisions of the Burger Court insofar as they bear on proscribed effect on competition.[183]

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[182] Certain tying is justified and not a violation of law. *See* note 179 *supra*. In other words, there is not an absolute per se rule against tying, but a modified per se rule. This state of the law allows for flexibility in business transactions. Should a firm desire to use a tying strategy in circumstances that promise apparent benefits to consumers with no apparent harm, and the firm has no less restrictive alternative available, the law is flexible enough to recognize the tie as justified.

[183] *See, e.g.*, Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

The outcomes of the Burger Court cases are acceptable and indeed would be indicated by the proposal. In the *Sylvania* case, the Supreme Court decided that a manufacturer is not barred by a per se rule from deciding where its distributors should be located. This decision clearly was correct and would be indicated by the proposal. A rule of law that disables manufacturers, particularly manufacturers without market power, from adopting an orderly distribution of their own products, holds great potential for harm to consumers. Therefore, it is inappropriate to bar such restraints without inquiry into their effect on competition.

Broadcast Music, Inc. v. CBS, Inc. involved a similar question: namely, whether the challenged conduct was properly characterized as illegal per se. In *Broadcast Music*, each of the two defendants served as nonexclusive licensing agents for millions of musical compositions. Thus, they served as intermediaries between the tens of thousands of individual composers, and the television and radio stations and networks that wished to use their works. Each defendant offered blanket licenses which gave the licensee the right to perform any and all of the compositions in the defendants' library, as often as the licensee wished, for a stated term. CBS, Second, the following principles should apply: (1) Antitrust law and policy should, as its central mission, seek to preserve and promote the competition process. (2) Within the constraints of the antitrust statutes and stare decisis, where consumer interests and other antitrust goals coincide, economics should be used as a tool to protect the functioning of markets and to advance consumers' interests, and efficiency so conceived should be a major guide to antitrust policy. (3) Where established antitrust principles and rights exist apart from consumer interests, the courts should respect stare decisis, except, (4) efficiency should serve as a limiting principle, in the sense that antitrust law should never be applied in a manner that threatens to hurt consumers over the long run.

Finally, the consumer/efficiency goals of antitrust should be refined. In theory, dominant weight might be accorded to all cost savings, including those claimed to be forthcoming by leading firms in concentrated markets; credence might be given to the view that business is profit-maximizing and will make cost-saving decisions if left free from government interference; and focus might be placed on output-restriction as the central or only economic concern. On the other hand, special value might be given to the pressures from the forces of competition, and to dynamic efficiencies likely to be gained from open markets with lower barriers to entry and greater economic incentives for firms without market power.

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a licensee, objected to the blanket licensing as per se illegal price-fixing. The Supreme Court properly held that the challenged act—blanket licensing—should not be characterized as per se illegal and thus absolutely banned without inquiry into the effect on the market. Each of the two defendants provided a substantial service to consumers; they made a market in thousands of compositions that could not otherwise reach users at reasonable cost. Application of the per se rule clearly threatened consumer interests.

The *General Dynamics* case involved an acquisition of coal companies, one of which, United Electric, faced depleting, unrecoverable reserves. The district court dismissed after trial, holding that the United States had not proved its case. The only market share data the government had introduced was data indicating past market shares, and under the unique factual circumstances, the past success of United Electric was not useful as a proxy for future market position. The Supreme Court affirmed. The decision is clearly defensible. A plaintiff should be put to the proof of its case. *General Dynamics* signals that the less demanding approach taken by the Warren Court is no longer acceptable. *See, e.g.,* United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

In all three cases, some of the language is overbroad. Langnage in the cases could suggest a siguificant retrenchment in antitrust policy, and could indicate a new focus on restraints on output. Other recent Supreme Court cases, however, do not support this narrow reorientation of antitrust doctrine. A dynamic and fluid approach is indicated by the majority opinion in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). *See* Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643 (1980). *See generally* Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemption, Expanding Coverage, and Refining the Rule of Reason,* 27 U.C.L.A. L. Rev. 265, 322-36 (1979).

The first preference corresponds generally with resistance to antitrust and is used in defense of concentration and market power. The second preference corresponds generally with the historical goals of antitrust and is used in defense of the competition process. Proponents of both perspectives claim to protect the consumer interest. Where the choice must be made, the second conception should be preferred because it is harmonious with, rather than hostile to, the fabric of antitrust.[184]

In sum, antitrust should be modernized. The law should be responsive to societal needs for enhanced efficiency, in the interest of consumers. At the same time, antitrust should and can retain compatibility with its multivalued, flexible charter, tested by more than ninety years of history, and still the richest framework for progressive, pluralistic free enterprise.

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[184] The choice of a definition of efficiency may be crucial to the outcome of litigation, and vacillation between the poles is bound to produce uncertainty and inefficient antitrust enforcement. The role of normative judgments when economic answers are not clear is captured in a statement by Professor Gellhorn in his review of *The Antitrust Paradox:*

> What should the enforcement official or judge do, for example, where the evidence is unclear whether the price discrimination injures consumer welfare, where empirical data do not demonstrate that a merger will or will not increase efficiency, or when continuation of a monopoly threatens innovation or productive efficiency? What legal presumptions (which lawyers know are likely to be decisive) should be applied, and who should bear the burden of proof?

Gellhorn, Book Review, 92 HARV. L. REV. 1376, 1384 (1979) (reviewing R. BORK, THE ANTITRUST PARADOX).