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Recommended Citation

The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency, in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (Oxford University Press, Robert Pitfosky, Editor, 2008)

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The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency

John B. Kirkwood and Robert H. Lande

One of the foundations of Chicago School antitrust policy is that the only permissible objective of antitrust law is to enhance economic efficiency.[63] The centrality of this lodestar to the Chicago School was explained eloquently by then-Professor Robert Bork:

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. . . . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.[64]

Bork not only supplied the question; he also was the original supplier of its answer. He performed a "strict constructionist" analysis of the antitrust laws' legislative history in a famous and often-cited 1966 law review article.[65] Bork appeared to demonstrate how the legislative history of the Sherman Act established that when Congress debated and passed this law it had only one concern: increased economic efficiency.[66] As part of this analysis he made an apparently convincing argument that, if the legislative debates were analyzed closely, the then-common "populist" views of antitrust, including the belief that the antitrust laws were passed to further a variety of social and political goals, such as combating the political power of big business, or assisting small businesses, were not a concern of Congress.[67] The efficiency conclusion is now Chicago School gospel. Indeed, Judge Richard Posner recently asserted that virtually everyone now agrees

that the antitrust laws have a single objective—maximizing economic efficiency.[68]

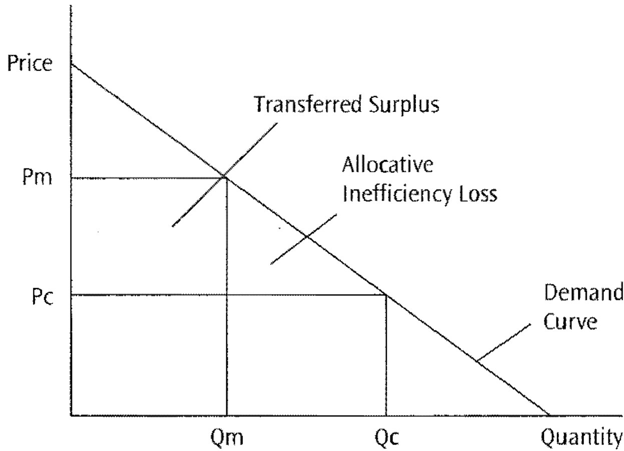
The purpose of this chapter is to demonstrate that the Chicago School is wrong, as to both congressional intent and to recent case law. The primary goal of antitrust actually is to prevent "unfair" transfers of wealth from purchasers to firms with market power. We submit that the antitrust laws on the books today best can be explained as a congressional declaration that the property right we term "consumers' surplus"[69] belongs to consumers,[70] not to cartels or to no one. The antitrust laws were enacted primarily to award this relatively amorphous property right to consumers, and to prevent cartels and monopolies from taking it. Another way to express this is to note that the primary goal of the antitrust laws can be expressed in consumer protection terms[71]: these laws better define consumers' property rights and protect them from being stolen by firms with market power.[72]

This chapter first will demonstrate that the wealth transfer concern is the primary reason for the passage of the antitrust laws and is a far more plausible explanation than the efficiency goal. Its next section will analyze the treatment of these issues in recent antitrust cases. It will show how these cases can be best explained in terms of a concern with wealth transfers, as opposed to a concern with efficiency. For these reasons, we conclude that the foundation of the Chicago School is flawed, and that the correct path of antitrust policy should not be determined by the view that increasing efficiency is more important than protecting consumers.

I. The Legislative History

Judge Bork argued that the original framers of the Sherman Act had a single intent: to enhance economic efficiency. He argued that "the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[73] Bork explicitly rejected distributive issues as a possible area of congressional concern: "[I]t seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity."[74]

Bork pointed to dozens of statements revealing an overriding congressional concern that cartels and certain other business forms would acquire the power to artificially raise prices and restrict output.[75] Bork presented many statements of concern by Senator Sherman[76] and other legislators[77] that some of the trusts and other businesses of the period had enough power to raise prices. Bork summarized this portion of the debates succinctly: "[t]he touchstone of illegality is raising prices to consumers. There were no exceptions."[78] Since we know of no serious disagreement that this indeed was the preoccupation of the debates, we will not discuss it further. Bork then used modern economic analysis to explain how monopoly power



leading to higher prices for consumers can produce the form of economic inefficiency we today term allocative inefficiency.[79]

Bork reasoned that since we now know that the "only" harm to "consumer welfare" from higher prices is allocative inefficiency, congressional displeasure with market power can fairly be equated with a concern about allocative inefficiency. He then presented a smaller, although still significant, number of quotations that showed a congressional desire to preserve and enhance corporate productive efficiency.[80] On the basis of this evidence, Bork concluded that the antitrust laws embody only a concern for "consumer welfare," which he equated with the "maximization of wealth or consumer want satisfaction"[81] and the aggregate economic efficiency of our economy.[82]

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

Bork's efficiency conclusion cannot reasonably account for many important statements from the Sherman Act's legislative history.[83] For example, Senator Sherman termed the higher prices "extortion"[84] and "extorted wealth."[85] One congressman referred to the overcharges as "robbery,"[86] and a complaint was made that the trusts "without rendering the slightest equivalent" have "stolen untold millions from the people."[87] Another

congressman complained that the beef trust "robs the farmer on the one hand and the consumer on the other."[88] Another declared that the trusts were "impoverishing" the people through "robbery."[89] Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community... wealth which ought to be generally diffused over the whole community."[90] Another senator complained: "They aggregate to themselves great enormous wealth by extortion...."[91]

Do terms like "stealing," "robbery," "extortion," and "stolen wealth" sound like allocative inefficiency? Is it not much more likely that Congress in effect awarded the property right we today call "consumers' surplus" to consumers, and under the antitrust laws, the taking of consumers' surplus by cartels constitutes theft?[92]

To further contrast the efficiency and wealth transfer goals, consider why stealing is illegal. Why does society make it illegal for people to reach their hands into other peoples' wallets and take their money?

Stealing is inefficient. There is no doubt that if it were legal to steal, this would lead to inefficiency.[93] But, do we condemn stealing because of its inefficiency effects? Is not the real reason we condemn stealing because it constitutes an "unfair" taking of property without consent and without compensation? Stealing is an unfair transfer of wealth, and this is the reason why stealing money out of someone's wallet is—and should be—illegal.

Moreover, even though Congress's main complaint about trusts—that they were perceived to raise prices to purchasers—cannot equate to a concern with allocative inefficiency, could Congress primarily have been concerned with corporate productive efficiency? Did Congress pass the Sherman Act primarily to help corporations save costs and otherwise increase corporate productive efficiency?

While it is true the Congresses that enacted the antitrust laws did appreciate corporate efficiency,[94] they nevertheless passed the antitrust laws that in so many ways attacked these highly efficient organizations.[95] If all they had wanted to do was to encourage that form of industrial organization that was then the most productively efficient, they would have praised the trusts, not condemned them in the legislative debates and enacted a law that condemned many of their activities. Congress must have been concerned with other goals. This leaves the wealth transfer explanation as being most consistent with the evidence.

II. The Case Law

In recent years, the case law has largely adopted the view that the ultimate goal of the antitrust laws is to protect consumers, not increase efficiency. While most decisions do not address the issue, those that do almost always indicate that the fundamental objective of antitrust is to improve the

welfare of consumers. When courts use the term "consumer welfare," moreover, they do not appear to be referring to economic efficiency. Judges rarely describe the goal of antitrust as enhancing efficiency and, more important, they *never* say that conduct that harms consumers in the relevant market is justified if it increases the efficiency of the economy. While it is possible that courts are using "consumer welfare" as Bork did, recent opinions provide little evidence of that. Instead, most judges seem to believe that the aim of antitrust is to prevent conduct that deprives consumers of the benefits of competition and transfers their wealth to firms with market power.[96]

In section A, we provide an overview of the case law by explaining why most courts, even when they use the ambiguous term "consumer welfare," likely believe that the preeminent objective of the antitrust laws is to protect consumers, not enhance efficiency. Then we examine the cases themselves. In section B, we focus on recent Supreme Court and appellate court decisions that illuminate the ultimate purpose of the antitrust laws. In section C, we look at the area where the courts have most often faced a conflict between protecting consumers and enhancing efficiency—merger cases.

A. "Consumer Welfare" and the Welfare of Consumers

The term "consumer welfare" is ambiguous because it could refer either to the welfare of consumers in the relevant market or to economic efficiency. This ambiguity arose because Bork equated "consumer welfare" with the efficiency of the economy,[97] and the Supreme Court quoted Bork when it declared that the legislative history of the Sherman Act suggests it is a "consumer welfare prescription."[98] As a result, when courts use "consumer welfare" today, they could be invoking Bork's concept, not the literal meaning of the term, and thus could be indicating that what they really care about is total welfare, not the welfare of consumers. For four reasons, however, we doubt this is so.[99]

First, some decisions clearly take the position that the ultimate objective of antitrust law is to benefit consumers, not increase efficiency. As we will see, in *Brooke Group,*[100] the Supreme Court equated "consumer welfare" with the welfare of consumers, not with total welfare, and accorded primacy to the former.

Second, while most opinions are less clear, they appear to support a consumer-oriented view of antitrust law because they focus on consumer impact rather than efficiency. In assessing the conduct at issue, they expressly examine its effect on things that matter to consumers—such as price, quality, or choice—but they rarely examine its effect on total welfare.

Third, in recent years, very few decisions state that any aspect of efficiency is a goal of the antitrust laws and those that do refer only to allocative efficiency. If these courts had been following Bork, they would have mentioned productive efficiency as well.[101] Moreover, the decisions that

identify allocative efficiency as a goal always treat it as a correlate of consumer impact, not an independent value.[102]

Fourth, and most important, whenever the courts have addressed an actual or potential conflict between consumer well-being and efficiency, consumer interests have always prevailed. As section C illustrates, no recent decision has taken the position that an improvement in economic efficiency trumps an adverse impact on consumers.

B. Decisions Illuminating the Ultimate Objective

In contrast to Bork and Posner, antitrust decisions today rarely describe the ultimate goal of the antitrust laws as increasing efficiency. In recent years, however, many decisions have indicated that the purpose of the antitrust laws is to protect consumers or enhance consumer welfare.[103]

1. Supreme Court

In *Brooke Group,* the Court identified the "traditional concern" of the antitrust laws as "consumer welfare and price competition."[104] The Court equated consumer welfare, moreover, not with economic efficiency but with the benefits received by consumers in the relevant market. In analyzing whether unsuccessful predatory pricing should be illegal, the Court noted that below-cost pricing could sometimes cause allocative inefficiency. It declared, however, that unsuccessful predatory pricing "produces lower aggregate prices in the market, and consumer welfare is enhanced."[105] In measuring consumer welfare by the level of prices in the market rather than by allocative efficiency, the Court signaled that the ultimate aim of antitrust law is to enhance the well-being of consumers in the relevant market, not maximize economic efficiency or minimize inefficiency.[106] Thus, the Court noted that unsuccessful predation is "in general a boon to consumers."[107]

In *Weyerhaeuser,*[108] a more recent case challenging predatory bidding rather than predatory pricing, the Court repeatedly compared the effects of the two practices on consumers. In total, the *Weyerhaeuser* opinion contains 12 references to consumer impact (e.g., "consumer welfare,"[109] "lower prices to consumers,"[110] "consumer harm,"[111] "effect on consumer prices"[112]). The opinion contains no references to economic efficiency. Although the Court ultimately adopted a test for predatory bidding that depends on the practice's effect on suppliers, not consumers, that is consistent with the legislative history's concern with the transfer of wealth from innocent parties (buyers or sellers) to firms with market power. Like the Congress that passed the Sherman Act, therefore, *Weyerhaeuser* focused on harm to these market participants, not to the efficiency of the economy.

In *Leegin,*[113] the Court stated that the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's

best interest."[114] In articulating a one-to-one correspondence between effects of competition and effects on consumers, the Court indicated that the lodestar of antitrust analysis is impact on consumers. Elsewhere, the Court did state that the *per se* rule against resale price maintenance could cause manufacturers to engage in "inefficient" practices,[115] and it suggested that vertical price fixing was frequently "efficient."[116] On the whole, however, the Court stressed the welfare of consumers. It repeatedly referred to matters of concern to consumers such as price levels, product quality, and options.[117] It never mentioned "total welfare" or "total surplus," even in explaining why inefficient vertical practices were undesirable. On the contrary, the Court said that inefficient practices harmed "consumer welfare" because they forced consumers to pay higher prices.[118]

2. Appellate Courts

This same focus on the well-being of consumers rather than economic efficiency is evident in recent appellate opinions. For example, the Seventh Circuit stated: "The principal purpose of the antitrust laws is to prevent overcharges to consumers."[119] The Sixth Circuit quoted a trial court's statement that "the very purpose of antitrust law is to ensure that the benefits of competition flow to purchasers of goods affected by the violation."[120] Writing for the D.C. Circuit, Judge Ginsburg characterized a court deciding an antitrust case as a "court of consumer welfare,"[121] and his opinion suggests he meant the welfare of consumers, not economic efficiency. When he summarized the FTC's methodology for evaluating horizontal restraints, first announced in *Mass. Board of Optometry*,[122] and explained why it was acceptable, he referred to impact on consumers eight times but never mentioned economic efficiency.[123] Most important, when he described what a defendant must show under the Commission's methodology to justify a restraint, he did not use the metric of economic efficiency. He did not say that a restraint would be justified if it enhances productive efficiency more than it reduces allocative efficiency, or if it increases producers' surplus more than it diminishes consumers' surplus. Instead, a defendant must show that "the restraint in fact does not harm *consumers* or has 'procompetitive virtues' that outweigh its burden upon *consumers*."[124]

Many other appellate decisions have also indicated that the ultimate test of whether a practice violates the antitrust laws is its impact on consumers. In *Microsoft*,[125] the D.C. Circuit declared, "to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers."[126] Both the Eleventh Circuit and the Fourth Circuit have quoted this statement.[127] The Tenth Circuit stated, "to be judged anticompetitive, the [conduct] must actually or potentially harm consumers."[128] Writing for the Seventh Circuit, Judge Easterbrook echoed the thesis of this article when he declared: "Calling the selection of components for one's product a 'tie-in' does not

help to uncover practices that restrict output, drive up prices, and transfer wealth from consumers to producers."[129]

C. Merger Cases: Increased Efficiency Never Excuses Harm to Consumers

In merger cases, courts have frequently faced an actual or potential conflict between economic efficiency and the welfare of consumers.[130] If a merger is likely to generate both cost savings and greater market power, the increase in productive efficiency could easily outweigh the loss in allocative efficiency, causing a net gain in overall efficiency, even though consumers in the relevant market are hurt because they have to pay higher prices.[131] No U.S. court, however, has ever allowed a merger that was likely to increase prices in the relevant market (or otherwise diminish consumer choice) because it would enhance economic efficiency. To the contrary, the courts have uniformly insisted that merging parties cannot establish an efficiencies defense unless they show both that the merger would generate significant cost savings and that enough of those savings would be passed on to consumers that consumers would benefit from (or at least not be hurt by) the merger.

In *Heinz,*[132] for example, the D.C. Circuit stated that a "defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."[133] In *Swedish Match,*[134] Judge Hogan held that the defendants' efficiency evidence was insufficient to overcome the presumption of illegality because the defendants had not shown what proportion of their cost savings they would pass on and "how that will defeat the likely price increases in this market."[135] Both of these decisions stand for the proposition that "an acquisition that lowers costs may still be unlawful 'if it results in an increased likelihood of higher prices.' "[136] Other cases concur,[137] and there is no decision to the contrary. The merger cases to date, therefore, have uniformly applied a consumer impact standard, rather than a total welfare standard, to the evaluation of claimed efficiencies.[138]

In some of these cases, moreover, this position was not simply dictum. The court found actual merger-specific efficiencies but disregarded some or all of them because they were unlikely to benefit consumers. In *Staples,*[139] for example, the defendants asserted that the challenged transaction would produce a variety of efficiencies, including better prices from vendors and reduced distribution costs.[140] Although Judge Hogan identified numerous problems with this defense, he did not conclude that the merger would generate no significant cost savings. To the contrary, he stated that "the Court believes that there would be some efficiencies realized by the merger."[141] He ruled that these savings did not excuse the transaction, however, because

most of them would not be passed on,[142] and thus consumers in the relevant markets would likely pay higher rather than lower prices after the merger.[143]

Conclusion

The normative foundation of Chicago School antitrust policy is flawed. Both the legislative history of the antitrust laws and recent case law indicate that the fundamental goal of antitrust enforcement is not increasing economic efficiency. It is protecting consumers in the relevant market from practices that deprive them of the benefits of competition and transfer their wealth to firms with market power.

Notes

1. U.S. antitrust law was adopted to contain private power; to give free and fair access to market actors without power; and to try to assure "that consumers get to determine who wins the competitive race." See Irwin Stelzer, "Coping with Market Power in the Modern Era," White Paper, Hudson Institute (Spring 2007), 12, available at www.hudson.org/files/publications/StelzerWhitePaperMarch07.pdf; Eleanor M. Fox, The Modernization of Antitrust—A New Equilibrium, 66 Cornell L. Rev. 1140 (1981).

2. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004).

3. *See Texaco v. Dagher,* 547 U.S. 1 (2006).

4. *See* Wolfgang Kerber & Nicole J. Sam, *Competition as a Test of Hypotheses: Simulation of Knowledge-generating Market Processes,* 4 J. Artificial Societies & Soc. Simulation n0.3, http://www.soc.surrey.ac.uk/JASSS/4/3/2.html (2001).

5. *See* Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress,* 62 N.Y.U. L. Rev. 1020 (1987); F. M. Scherer, *Antitrust, Efficiency, and Progress,* 62 N.Y.U. L. Rev. 998 (1987).

6. Losses to producers squeezed out of business by exclusionary practices are typically disregarded, whether they are squeezed out by competition itself or by anticompetitive conduct.

7. *See FTC v. Indiana Federation of Dentists,* 476 U.S. 444 (1986). *See also* Thomas B. Leary, *The Significance of Variety in Antitrust Analysis,* 68 Antitrust L.J. 1007 (2001); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law,* 74 Antitrust L.J. 175 (2007).

8. *See Trinko,* 540 U.S. 398; *United States v. Microsoft Corp.,* 253 F.3d 34, 49–50, 65 (D.C. Cir. 2001), *cert. denied,* 534 U.S. 952 (2001).

9. *See, e.g., United States v. Oracle Corp.* (Oracle/PeopleSoft), 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

10. *See FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 127 S. Ct. 2705 (2007), Justice Breyer dissenting.

11. Even so, particular takeovers are often inefficient. They can increase firms' costs by creating cultural incompatibilities and decreasing flexibility and adaptability. A notorious example is Time Warner/AOL. *See* Rob Walker, *Creating Synergy Out of Thin Air,* N.Y. Times, July 28, 2002, C13.

12. In rare cases, antitrust law can be prescriptive. It can impose duties to open markets, as opposed to mandates not to close them by anticompetitive acts. Affirmative duties are disfavored in the United States. *See Trinko,* 540 U.S. 398; *see* Makin Delrahim, "Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust," paper presented at the British Institute of International and Comparative Law, London, England, May 10, 2004, available at http://www.usdoj.gov/atr/public/speeches/203627.htm.

13. *See* Stelzer, *supra* note 1 at 14.

14. "No business sense" is one of several tests commonly suggested today as the screen and the standard for anticompetitive conduct by dominant firms. It is similar to the test suggested by Judge Bork, when he said in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210 (D.C. Cir. 1986): if the conduct or agreement is not designed "to restrict industry output, then [it] must be designed to make the conduct of their business more effective." *Id.* at 221. Other proposed tests include whether the dominant firm sacrificed profits at stage one to make monopoly profits at stage two, and whether defendant's conduct would destroy an equally efficient competitor. Balancing anticompetitive harms against procompetitive (efficiency) benefits would yield more enforcement, but is disfavored by the current enforcers.

15. *See Schor v. Abbott Labs.,* 457 F.3d 608 (7th Cir. 2006), *cert. denied,* 127 S. Ct. 1257 (2007), Easterbrook, J.: "And if a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust law to play." *Id.* at 612.

16. Again, this formulation produces the narrowest scope of illegality. It is possible, but less likely, that vertical or potential-competition mergers will have this proscribed effect.

17. *See,* for critical role of presumptions, Andrew J. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance,* 72 ANTITRUST L.J. 3 (2004).

18. This paper is about antitrust law other than cartel law for the following reasons: The strong law against hard-core cartels (meaning: price, output, or market division agreements among competitors that are designed only to get rid of the competition among the parties and have no credible claim of being, for example, a synergistic joint venture) has been a staple of antitrust enforcement for a hundred years and is supported by all perspectives on antitrust. Liberals or pluralists support the law because cartels exploit their customers or suppliers and because they paradigmatically offend the principle of market governance by competition, not powerful firms. Libertarians or conservatives might support the law because cartels are inefficient and output limiting; and, since cartelists have no excuse that they are responding to and serving the market, the costs of error from the prohibition are virtually nonexistent. In the matter of cartels, liberals and

libertarians meet. The law is supported by economics and socio-political concerns. Only industrial policy advocates are likely to take exception.

19. Note that the outcome perspective requires that private action, to be caught by the law, must (probably) decrease output. This means that most tying and other uses of leverage by dominant firms, even if unjustified, will not be caught by antitrust. Leveraging is "only" a *use* of power, not an *increase* of power. *See Trinko,* 540 U.S. 398, at n. 4. For the contrasting EU approach to distortion of competition, *see Microsoft Corp v. Commission,* Case T-201/04, Sept. 17, 2007.

20. Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 566 (1955). Note that Sumner's argument was not that markets would always work well but that, however they worked, no law could stop them. As for the professional economists, "insofar as is known," Congress considered one antitrust bill after another without calling on their advice. The legislators of the time distrusted experts. However, if Congress had sought the advice of the economists, it could not have expected support for the Sherman Act. *Id.* at 120–21.

21. Irwin Stelzer argues that process and access are all the more important in high tech industries, "'lest high-tech' be converted to 'my-tech' by dominant firms" and powerful incumbents slow down or exclude "incursions of technologically superior challengers." Stelzer, *supra* note 1 at 11, 14.

As to the importance of mavericks, *see* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws,* 77 N.Y.U. L. REV. 135 (2002).

22. The process may be regarded as iterative. It provides a learning and feedback mechanism. Firms observe, learn, compete, innovate, and adjust. *See* Kerber, *supra* note 4. *See,* for a description of antitrust rules and standards based on a process/open market approach, E. Fox, *Abuse of Dominance and Monopolization: How to Protect Competition without Protecting Competitors, in* Claus-Dieter Ehlermann & Isabela Atanasiu, eds., EUROPEAN COMPETITION LAW ANNUAL: WHAT IS AN ABUSE OF A DOMINANT POSITION? (Hart, 2006).

23. *See Brown Shoe Co. v. United States,* 370 U.S. 294 (1962).

24. *See* Jeffrey Rosen, *Majority of One: Stevens at the Supreme Court,* N.Y. Times Mag., Sept. 23, 2007, 50.

25. This is not the precise language of the Court, but is readily inferred from the majority opinions. *See, e.g., Leegin,* 127 S. Ct. 2705.

26. *See* Thomas B. Leary, *The Inevitability of Uncertainty,* 3 COMPETITION LAW INT'L 27 (2007) (Journal of Antitrust Committee of International Bar Ass'n): Although the Chicago revolution substituted a "single lodestar"—economic welfare of consumers—for diffuse populist objectives, "this did not mean that cases would necessarily be easier to decide or to handicap. Quite the contrary." *Id.* at 28.

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

28. *California Dental Ass'n v. FTC,* 526 U.S. 756 (1999).

29. *Supra* note 2.

30. *Supra* note 11.

31. *Supra* note 26.

32. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (Japanese Electronics), 475 U.S. 574 (1986).

33. 509 U.S. at 226.

34. *See, e.g.*, John McGee, *Predatory Pricing Revisited,* 23 J. L. & ECON. 289, 292–94 (1980).

35. *See, e.g.*, Joseph F. Brodley, *Predatory Pricing: Strategic Theory and Legal Policy,* 88 GEORGETOWN L.J. 2239 (2000).

36. Nonetheless, in a subsequent case charging predatory buying (*Weyerhaeuser*) in which the dominant defendant overbought saw logs at inflated prices to eliminate its rivals from the market and did eliminate them, the Court reaffirmed its dictum in *Brooke Group.* It said that price predation almost never happens. The Court declared that predatory buying is the mirror image of predatory selling and that enjoining the high buying price (the first leg of buyer predation) was just as harmful to consumers as enjoining a low selling price, and that therefore the tough standards of proof for predatory selling should apply equally to predatory buying. *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007).

37. A ruling for plaintiff could have been based on the loss of consumer welfare in the particular case, as argued by Liggett's appellate lawyer Phillip Areeda.

38. *Supra* note 27.

39. 526 U.S. at 776–77.

40. *See* Justice Breyer, concurring and dissenting: "[W]hy should I have to spell out the obvious? To restrain truthful advertising about lower prices is likely to restrict competition in respect to price—'the central nervous system of the economy.' " 526 U.S. at 781, 784.

41. I stress conservative and not conservative/libertarian. Skepticism regarding professional self-regulation and state professional regulation is one point at which liberal and libertarian philosophies meet. Both FTC Chairman Michael Pertschuk (appointed by President Jimmy Carter) and FTC Chairman Timothy Muris (appointed by President George W. Bush) brought or supported proceedings against doctors and dentists and restrictive eye glass regulations.

42. *Supra* note 2.

43. The rival was AT&T. AT&T had already settled its regulatory and antitrust claim against Verizon.

44. This is the Court's rendition of the "*Aspen* exception."

45. 540 U.S. at 407.

46. I distinguish formulation of the antitrust principles from the outcome of the case. The case was a regulated industries case and, under an unusually procompetitive regulatory statute, the Federal Communications Commission had already taken action against the anticompetitive conduct.

47. *Supra* note 11.

48. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911); *overruled, Leegin,* 127 S. Ct. 2705.

49. *Leegin,* 127 S. Ct. 2705.

50. *State Oil Co. v. Khan,* 522 U.S. 3 (1997) (an antitrust rule of law preventing maximum resale price agreements per se is clearly inefficient).

51. *See* Annual Reports on Competition Policy of the European Commission; e.g., Reports of 2005, 2006.

52. The irony is that the openness/process perspective is sympathetic to the legislative origins of the U.S. antitrust laws, and the outcome/output perspective—which is in the ascendancy in the United States—is not. Nonetheless, there are a number of examples of U.S. courts' taking an openness/process approach. One notable example is *Microsoft, supra* note 8. The court valued market access for competitors, free from unjustified restraints. The government had not proved that Microsoft's abuses cut back the output of computer software. Nonetheless, the court *assumed* harm to competition from Microsoft's "bad acts" that foreclosed competitors from certain efficient channels, combined with Microsoft's failure to assert a good business justification. See Eleanor M. Fox, *What is Harm to Competition?—Exclusionary Practices and Anticompetitive Effect,* 70 ANTITRUST L.J. 371 (2002).

53. Treaty of Rome establishing the European Community, as last amended at Nice, Official Journal C 325, Dec. 24, 2002.

54. *Microsoft Corp. v. Commission,* Case T-201/04, Court of First Instance, para. 691., Sept. 17, 2007, available at http://curia.europa.eu.

55. *Id.* at para. 654.

56. *Id.* at para. 407.

57. *Id.* at paras. 708, 709. The Court endorsed the Commission findings that Microsoft "did not sufficiently establish that [the required disclosure] would have a significant negative impact on its incentives to innovate." Para. 697.

58. *See, e.g., Trinko, supra* note 2.

59. *Microsoft Corp. v. Commission,* para. 666.

60. *Id.* at para. 266.

61. *Id.* at para. 670.

62. An efficiency standard can, however, weed out cases in which a plaintiff's victory would protect inefficient competitors at the expense of consumers. So, too, does a refined understanding of what is harm to competition. *See* Fox, WHAT IS HARM TO COMPETITION, *supra* note 52.

63. Much of this paper's legislative history and some of its analysis was taken from Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HASTINGS L.J. 65 (1982) [hereinafter *Wealth Transfers*]. Many of the cases in this paper were collected and originally analyzed in John B. Kirkwood, *Consumers, Economics, and Antitrust, in* 21 RES. L. & ECON., ANTITRUST LAW AND ECONOMICS 1 (John B. Kirkwood ed., 2004). This paper is an abbreviated version of a much longer paper the authors are preparing. *See* John B. Kirkwood & Robert H. Lande, "The Fundamental Goal of Antitrust Law: Protecting Consumers, Not Increasing Efficiency" (unpublished draft, 2007).

64. Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978).

65. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. L. & ECON. 7 (1966).

66. *Id.*

67. *Id.*

68. Richard A. Posner, ANTITRUST LAW *ix* (2d ed. 2001).

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

70. We use the term "consumers" to include all individual or business purchasers of products and services, regardless whether they are the ultimate end users.

71. This article will only address the price and quantity effects of situations of antitrust concern, and accordingly will only contrast the efficiency and wealth transfer approaches. Sometimes, however, consumer welfare cannot adequately be protected by antitrust enforcement that only considers price and closely related areas like cost and quantity. The "consumer choice" approach is another, more complex way to articulate the goals of the antitrust laws in those situations when non-price issues are at stake. "Consumer choice" is an emerging paradigm that also is completely economic in nature. It does incorporate the wealth transfer effects of market power. It also differs from the efficiency model in that it gives greater weight to short term non-price choices having to do with quality or variety, and also to long term innovation effects. *See* Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice" Approach to Antitrust Law,* 74 ANTITRUST L.J. 175 (2007).

72. The old pre-Chicago, social/political rationale for antitrust is dead and buried. It should not be resurrected. There might, however, be a sharply limited but distinctive way antitrust can and should protect small businesses. Antitrust policy should take small business welfare into account so long as this does not cause consumers to pay supracompetitive prices. For example, the legislative history indicates that Congress intended to protect sellers from buyers' cartels. *See infra* note 26 and accompanying text. For a discussion of buyers' cartels and other situations where antitrust intervention can protect seller welfare but not harm consumers, *see* John B. Kirkwood & Robert H. Lande, "The Fundamental Goal of Antitrust Law: Protecting Consumers, Not Increasing Efficiency" (unpublished draft, 2007).

73. Bork, *supra* note 64, at 91.

74. *Id.* at 111.

75. Bork, *supra* note 65, *passim.*

76. *See* 21 CONG. REC. 2457 (1890)(statement of Senator Sherman that trusts tend to "advance the price to the consumer"); 21 CONG. REC. 2460 (1890) (statement of Senator Sherman that it is sometimes contended that trusts reduced prices to the consumer, "but that all experience shows that this saving of cost goes to the pockets of the producer"); 21 CONG. REC. 2462 (1890) (statement of Senator Sherman asking Congress to protect the public from trusts that "increase the price of articles").

77. *See, e.g.,* 21 CONG. REC. 2558 (1890) (statement of Senator Pugh that trusts effectively "[destroy] competition in production and thereby [increase] prices to consumers").

78. Bork, *supra* note 65, at 16.

79. To raise prices, a monopoly or cartel reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers

than they would have cost society to produce. This foregone production is a pure social loss and constitutes the "allocative inefficiency" of monopoly or cartel pricing. For example, suppose that widgets cost $1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for $2.00. A potential purchaser that would have been willing to pay up to $1.50 will not purchase at the $2.00 level. Since a competitive market would have sold the widgets for less than they were worth to this potential purchaser, the monopolist's reduced production has decreased the consumer's satisfaction without producing any countervailing social benefits. This loss is termed "allocative inefficiency." For an extended discussion and formal proof that monopoly pricing creates allocative inefficiency, *see* Edwin Mansfield, MICROECONOMICS: THEORY AND APPLICATIONS 277–292 (4th ed. 1982).

80. Bork, *supra* note 65, at 26–31.

81. *Id.* at 7.

82. Bork, *supra* note 64, at 91.

83. For similar wealth transfer oriented statements from the legislative history of the Clayton Act, *see Wealth Transfers, supra* note 63, at 128; for similar statements from the legislative history of the Celler-Kefauver Act, *see Wealth Transfers, supra* note 63, at 135–36; for similar statements from the legislative history of the Federal Trade Commission Act, see *Wealth Transfers, supra* note 63, at 112–14.

84. 21 CONG. REC. 2461 (1890) (quoting Senator Sherman).

85. 21 CONG. REC. 2461 (1890) (quoting Senator Sherman).

86. 21 CONG REC. 2614 (1890) (statement of Congressman Coke).

87. 21 CONG. REC. 4101 (1890) (statement of Representative Heard).

88. 21 CONG. REC. 4098 (1890) (statement of Congressman Taylor).

89. 21 CONG. REC. 4103 (1890) (statement of Representative Fithian, who was reading, with apparent approval, a letter from a constituent).

90. 21 CONG. REC. 2728 (1890) (statement of Senator Hoar).

91. 21 CONG. REC. (1768) (statement of Senator George).

92. Congress wanted to protect all those who purchased products and services; it made no distinction between wealthy and poor consumers, or between business and individual consumers. Nor did Congress seem concerned whether purchasers absorbed the overcharges or passed them on. While Congress frequently referred to "consumers," it did not appear to care only about ultimate consumers. In other words, any direct purchaser should be deemed a "consumer" for antitrust purposes, regardless what they decided to do with their purchase. Otherwise every price rise by a cartel, etc. would have to be examined to determine whether it affected ultimate consumers, or whether instead it had been absorbed by intermediaries. This can be a very difficult undertaking. Many of the complexities that would arise if antitrust were only concerned with the welfare of ultimate consumers are analyzed in Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light,* at 24–30 (Mar. 23, 2007), *available at* http://ssrn.com/abstract=975992.

93. For example, if it were legal to take other peoples' property, their incentives to work hard would likely be diminished.

94. See Bork, *supra* note 65, at 26–31.

95. The Standard Oil trust, for example, was never attacked for being inefficient. *See, e.g.*, Ida M. Tarbell, *The History of the Standard Oil Company*, McClure's Magazine, 1902–1904. *See generally* Ron Chernow, Titan: The Life of John D. Rockefeller, Sr. (1998). Nor did the government ever assert that Standard Oil violated the Sherman Act by being inefficient. For an excellent and thorough analysis of the Standard Oil case, *see* James May, *The Story of Standard Oil Co. v. United States, in* Antitrust Stories 7 (Eleanor M. Fox & Daniel A. Crane, eds., 2007).

96. There are only two exceptions to the preeminent status of consumers in antitrust law. The first is the Robinson-Patman Act, whose principal purpose is not to promote competition (and thus benefit consumers) but in certain circumstances to protect small business from competition. *See, e.g.*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 Antitrust L.J. 625, 632–35 (2005). The second exception arises in the relatively few cases that involve anticompetitive behavior by buyers. In these cases, the courts usually aim to protect suppliers from exploitation, not consumers. *See, e.g., Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1133–34 (10th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003) ("The Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users.") We will not address these exceptions in this chapter. They are limited in scope, and neither supports the Chicago School view that the paramount objective of antitrust law is economic efficiency.

97. *See supra* note 81–82 and accompanying text.

98. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Bork, *supra* note 65, at 66). In *Reiter*, the Court did not actually endorse Bork's definition of consumer welfare. It never addressed whether the term referred to economic efficiency rather than the welfare of consumers.

99. *Accord*, Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 Antitrust L.J. 423, 432–33 (2005) (". . . the U.S. courts do not appear to be employing [consumer welfare] in the total-surplus sense that Bork formally attributed to it. That is, the U.S. courts use the phrase, but they appear to be following an antitrust policy predicted on the maximization of consumer surplus rather than total surplus.")

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

101. *See* Bork, *supra* note 65, at 91.

102. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995): "An act is deemed anticompetitive under the Sherman Act 'only when it harms *both* allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.' " (Emphasis added.)

103. To be sure, it is even more common for courts to say that the purpose of the antitrust laws is to promote competition or the competitive process. *See* Kirkwood, *supra* note 63, at 30–31. Since the courts almost never define competition or the competitive process, however, these formulations do not provide a concrete guide for determining whether or not the antitrust

laws have been violated. In the last 15 years—the scope of our survey—many courts have remedied that problem by declaring that the purpose of the antitrust laws is to protect consumers.

104. 509 U.S. at 221.

105. *Id.* at 224.

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

107. 509 U.S. at 224.

108. *Weyerhaeuser,* 127 S.Ct. 1069.

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

110. *Id.* at 1077.

111. *Id.* at 1078.

112. *Id.*

113. *Leegin,* 127 S. Ct. 2705.

114. *Id.* at 2713.

115. *Id.* at 2716.

116. *Id.* at 2717.

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

118. *Id.* at 2722–23.

119. *Kochert v. Greater Lafayette Health Servs.,* 463 F.3d 710, 715 (7th Cir. 2006) (quoting *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.,* 814 F.2d 358, 368 (7th Cir. 1987) (Easterbrook, J.)).

120. *Louisiana Wholesale Drug Co. v. Hoechst Marion Roussel, Inc.* (*In re* Cardizem CD Antitrust Litig.), 332 F.3d 896, 904 (6th Cir. 2003).

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

122. *In re* Mass. Bd. of Registration of Optometry, 110 F.T.C. 549 (1988).

123. *See* 416 F.3d at 35–37.

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

125. *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C. Cir. 2001).

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

127. *See Spanish Broadcasting Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.,* 376 F.3d 1065, 1071 (11th Cir. 2004); *Dickson v. Microsoft Corp.,* 309 F.3d 193, 206 (4th Cir. 2002).

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

129. *Digital Equip. Corp. v. Uniq Digital Techs.,* 73 F.3d 756, 761 (7th Cir. 1996). Other courts have stated that the ultimate test is whether the conduct enhances or reduces "consumer welfare." In *Rebel Oil,* for example, the Ninth Circuit declared: "Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare." 51 F.3d at 1433. For the reasons described in section A, these decisions were likely referring to the welfare of consumers, not total welfare.

130. The same conflict could arise in other types of cases. *See* Jonathan A. Baker, *Competition Policy as a Political Bargain,* 73 ANTITRUST L.J. 483, 517–18 (2006). To our knowledge, however, no recent decision in any area

of antitrust law has permitted a practice likely to harm consumers on the ground that it would increase efficiency.

131. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs,* 58 AM. ECON. REV. 18 (1968). For an analysis of this conflict that examines whether prices to purchasers are likely to increase, see Alan A. Fisher, Frederick Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers,* 77 CALIF. L. REV. 777 (1989).

132. *FTC v. H.J. Heinz Co.,* 246 F.3d 708 (D.C. Cir. 2001).

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

134. *FTC v. Swedish Match,* 131 F. Supp. 2d 151 (D.D.C. 2000).

135. *Id.* at 172.

136. *Dr. Pepper/Seven-Up Cos. v. FTC,* 798 F. Supp. 762, 777 (D.D.C. 1992), *rev'd on other grounds,* 991 F.2d 859 (D.C Cir. 1993) (quoting FTC letter refusing to approve the acquisition).

137. *See, e.g., FTC v. Arch Coal, Inc.,* 329 F. Supp. 2d 109, 153 (D.D.C. 2004) (in assessing efficiencies, what is relevant are "the potential benefits to consumers from cost reductions and increased competition"); *U.S. v. Franklin Elec. Co. Inc.,* 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000) ("Defendants have not made the necessary showing that efficiencies would result *and* that they would lead to benefits for consumers in the relevant market") (Emphasis in original).

138. In contrast, Canada allowed the merger of Superior Propane and ICG Propane, even though it would harm consumers, because it would produce a substantial increase in total welfare. *See Comm'r of Competition v. Superior Propane, Inc.* [2003] 3 F.C. 529.

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

140. *See id.* at 1089–90.

141. *Id.* at 1092.

142. *Id.* at 1090.

143. *Id.* at 1091. Likewise, in *Dr. Pepper/Seven-Up* the district court found that the acquisition was likely to yield significant efficiencies. *See* 798 F. Supp. at 777. These cost reductions did not save the acquisition, though, because there was considerable evidence that the acquisition would increase prices in the relevant market. *Id.*