Antitrust Policy and Monopsony

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I
INTRODUCTION

The owners of major league baseball teams have colluded in dealing with free agents,[1] the NCAA regulates both the number of athletic scholarships and the amount of compensation that athletes receive,[2] financial aid officers of the elite colleges and universities meet to avoid a bidding war for the most desirable students,[3] tuna canneries in California allegedly fix purchase prices at artificially low levels,[4] and antique dealers have rigged bids in public auctions, dividing the spoils later.[5] What do all of these parties have in common? They employ monopsony power: power on the buying side of the market.[6]

The classical theory of monopsony envisions a market with only one buyer that uses its power to reduce the quantity purchased,

1   Hal Lancaster, *Baseball Owners Conspired to Shut Down Market for Free Agents, Arbitrator Rules*, Wall St. J., Sept. 22, 1987, at 10, col. 1. The major league baseball players negotiated away their rights to sue under the antitrust laws and, therefore, had to submit grievances based on alleged antitrust violations to arbitration. Some critics who fail to respect the laws of supply and demand prefer collusion. *See, e.g.*, George Vecsey, *Bring Back Collusion*, N.Y. Times, Dec. 13, 1989, at D23, col. 1.

2   Gary S. Becker, *The NCAA: A Cartel In Sheepskin Clothing*, Bus. Wk., Sept. 14, 1987, at 24.

3   David Johnston, *Price-Fixing Inquiry at 20 Elite Colleges*, N.Y. Times, Aug. 10, 1989, at 1, col. 2. The Department of Justice is also investigating these colleges and universities for the more traditional charge of price fixing on the selling side with regard to tuition. *See* Connie Leslie & Sue Hutchison, *An Ivy League Cartel*, NEWSWEEK, Aug. 21, 1989, at 65; *Division Seeks Documents From Colleges In Probe of Financial Aid and Tuition*, 57 Antitrust & Trade Reg. Rep. (BNA) 278 (Aug. 31, 1989).

4   Eagle v. Star-Kist Foods, 812 F.2d 538 (9th Cir. 1987). The plaintiffs were fishermen paid by vessel owners on a price per ton-of-fish-caught basis. Since the plaintiffs were employees of the vessel owners, their injuries were derived from those suffered by the vessel owners. On that basis, the Ninth Circuit held that they lacked standing.

5   United States v. Howe, Crim. No. 87-00262 (E.D. Pa. July 21, 1987).

6   Monopsony exists when there is a single buyer of a good or service. GEORGE STIGLER, THE THEORY OF PRICE 216-18 (1987).

thereby reducing the price that the monopsonist has to pay.[7] Since monopsony results in reduced prices, a hostile antitrust policy toward monopsony may appear inconsistent with our traditional antitrust goals.[8] But further analysis shows that successful deployment of monopsony power can cause inefficiencies and can hardly be regarded as competitive.[9]

Once thought to be a rare market phenomenon,[10] monopsony has received scant attention in most antitrust casebooks[11] and texts.[12] This lack of emphasis, however, ignores the symmetry of markets: for every seller there is a buyer. Just as sellers may have market power, so too may buyers. Further, to the extent that casebooks and texts include monopsony cases, they fail to distinguish power on the buying side of the market from the more traditional concern with power on the selling side. In the context of modern antitrust policy,[13] this lack of rigor is unfortunate. The current trend is toward substantive analysis[14] and away from the "bright line" tests prevalent in the earlier years of antitrust. This trend requires judges and scholars to fully appreciate economic consequences in order to avoid mistakes.[15] Analytical rigor is especially

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[7]   *Id.*; *see infra* notes 32-41 and accompanying text (precise details regarding exercise of monopsony power).

[8]   The traditional economic goal of antitrust policy is "to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and orgauizational techniques for putting economic resources to beneficial use." Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987).

[9]   *See infra* text accompanying notes 32-52.

[10]   *See, e.g.*, 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 964b (1980).

[11]   A notable exception is RICHARD A. POSNER & FRANK EASTERBROOK, ANTITRUST 146-50 (1981). Their casebook does not, however, deal with monopsony in any context other than price-fixing.

[12]   Two texts touch on monopsony but fail to provide a comprehensive analysis of the law or the economics. ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 178, 309-11 (1985); HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 17-18 (1985).

[13]   The increasing reliance upon economic analysis has been noted by many. *See, e.g.*, Turner, *supra* note 8 and Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, 50 LAW & CONTEMP. PROBS. 181, 181 (1987) ("In the past decade, a new picture of the antitrust landscape has begun to emerge. The dominant emphasis of the ever more popular view concerns the ascendance of economics in antitrust decisionmaking and doctrine, particularly in Supreme Court adjudication, which is leading the way for the lower courts.").

[14]   For a recent survey, *see June 13 Remarks of Dr. Betty Bock at University College of London*, 55 Antitrust & Trade Reg. Rep. (BNA) 109 (July 21, 1988) ("This emerging mode of judicial analysis . . . focuses . . . on the reasons for the conduct and on how it can be expected to affect the competitive process—and, in the end, the consumer.").

[15]   We examine the consequences of the move toward substantive analysis only in the monopsouy setting. A more general treatment is provided by William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989) (description of how economic theory influences

critical in the context of monopsony power because a monopsonist usually employs its power to *reduce* the price it pays. If a court uses the initial impact on price as the test for prohibited conduct, it may conclude that monopsonistic behavior should be excused when, in fact, just the opposite is true.[16] A court may reach such an erroneous conclusion for one of two reasons. First, as a purely substantive matter, judges may view *lower* prices as an indication that a practice is not harmful.[17] Second, as a procedural matter, plaintiff-sellers generally have been forced to sell their outputs at lower prices and, therefore, may be seen as not having suffered antitrust injury.[18]

A recent case decided by the Court of Appeals for the Sixth Circuit, *Balmoral Cinema v. Allied Artists Pictures*,[19] illustrates the importance of careful economic analysis to monopsony settings. In *Balmoral*, the exhibitors agreed not to engage in competitive bidding for films offered by distributors.[20] Standard bright-line antitrust analysis might have resulted in the practice being treated as a per se unlawful horizontal agreement to fix price, to engage in a group boycott, or to allocate customers. Instead, the court noted that the practice of the colluding buyers "may simply lower prices paid by exhibitors to distributors."[21] The court also opined that the collusion "may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare."[22] Although the

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antitrust decisionmaking in a variety of contexts including the application of per se rules and the definition of antitrust injury).

16   Admittedly, it is counter-intuitive that the removal of monopsony leads to *higher* input prices and, in most cases, *lower* prices of the monopsonist's output. This result is not a special case, however; rather, it is the general result. *See infra* notes 35-52 and accompanying text.

17   The logic of excusing lower prices is obvious: if prices of intermediate goods or raw materials are lower, production costs will be lower, and prices of final goods are apt to be lower, ultimtely benefiting the consumer. Despite its apparent obviousness, the argument is not correct. *See infra* notes 42-52 and accompanying text.

18   Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). For analytical treatments of antitrust injury, see Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539 (1989); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980). For an examination of antitrust injury in the monopsony setting, see *infra* notes 194-221 and accompanying text.

19   885 F.2d 313 (6th Cir. 1989).

20   The defendant-exhibitors were involved in a "split" arrangement under which they would not compete against each other for first-run films but would allocate films among themselves. The case was brought by a competing exhibitor who was unable.to obtain first-run films. *Id.* at 314-15.

21   *Id.* at 316.

22   *Id.* at 317. This is the same sort of mistake made by earlier courts confronting movie theatre splits. *See, e.g.*, Admiral Theatre Corp. v. Douglas Theatre Co., 437 F. Supp. 1268 (D. Neb. 1977), *aff'd as modified*, 585 F.2d 877 (8th Cir. 1978). Subsequent courts have reached what we consider to be the correct answer. *See, e.g.*, General Cin-

opinion is, on balance, a thoughtful one, it comes dangerously close to equating lower prices with overall economic benefit. In the case of monopsony, the presence of lower prices should not end the analysis because there is no correlation between an initial decrease in prices and any overall long-run benefits to consumers.[23]

Our principal objective is to integrate the theory of monopsony into the new substantive-based approach to antitrust analysis. We begin by describing the standard theory of monopsony and its economic harms.[24] Next, we pinpoint the similarities between monopsony and monopoly power before offering a brief overview of antitrust treatment of monopsony.

In the succeeding sections, we examine judicial treatment of monopsony power in the contexts of single-firm and collusive abuses of power,[25] mergers,[26] and price discrimination.[27] We demonstrate that when the courts have followed the bright-line formulas of the past,[28] they have generally treated monopsony in a manner that is consistent with traditional antitrust policy. In effect, blind adherence to formalistic rules has yielded correct substantive results. This consistency is threatened, however, by the increasing proclivity of courts toward substantive economic analysis of antitrust cases.[29] We then seek to put existing policy on firmer footing by proposing economically based justifications for those outcomes.[30]

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ema Corp. v. Buena Vista Distrib. Co., 532 F. Supp. 1244 (C.D. Cal.), *aff'd on other grounds*, 681 F.2d 594 (9th Cir. 1982).

[23]   *See infra* text accompanying notes 32-72.

[24]   *See infra* text accompanying notes 74-139 (explaining why we think that the classic model understates the complexity of monopsony behavior).

[25]   *See infra* text accompanying notes 75-139.

[26]   *See infra* text accompanying notes 140-80.

[27]   *See infra* text accompanying notes 181-93.

[28]   For example, Justice Douglas's admonition in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, *reh'g denied*, 310 U.S. 658 (1940) that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of . . . depressing . . . the price of a commodity in interstate or foreign commerce is illegal *per se*" remains sound advice under our analysis.

[29]   The reasoning in Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 313 (6th Cir. 1989) exemplifies our concern. Although it is appropriate to look at impact upon the consumer, a court can be misled if it fails to understand and correctly apply relevant economic principles.

[30]   Employing the right reasoning may be as important as reaching the right result. Blind adherence to bright-line rules does not always provide correct results. For example, *Socony* dictates that: "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Socony*, 310 U.S. at 223. Unthinking devotion to this rule led to the unjustifiable per se prohibition of maximum resale price fixing. *See* Albrecht v. Herald Co., 390 U.S. 145 (fixing maximum prices is a violation of the Sherman Act), *reh'g denied*, 390 U.S. 1018 (1968); *see also* Roger D. Blair & James M. Fesmire, *Maximum Price Fixing and The Goals of Antitrust*, 37 SYRACUSE L. REV. 43, 77 (1986) ("the Court's prohibition of maximum price fixing must be judged unambiguously negative and judicial policy in this area should be re-examined"); Roger D. Blair &

In so doing, we note the instances in which the courts probably have not considered the monopsony issue with sufficient depth and care. We also explain why the standard theoretical model often falls short as an accurate description of monopsony conduct. Finally, we analyze monopsony in the context of emerging standards for antitrust injury and antitrust standing.[31]

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II

CLASSICAL MONOPSONY
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A. Economic Standards

Pure monopsony entails a single buyer. It is the demand-side analog of the monopolist who is a single seller. Just as the monopolist has market power[32] in selling its wares, the monopsonist has buying power in purchasing its requirements.[33] Further, the economist objects to the exercise of monopsony power for the same reason she objects to the exercise of monopoly power—both cause social welfare losses.[34]

1. *The Monopsonist's Input Price and Quantity*

Figure 1 illustrates the welfare losses resulting from monopsony. It depicts supply[35] and demand for an intermediate[36] good. In this model, we assume that the sellers have no market power. If the monopsonist ignored the effect that its purchases actually have on the good's price, *i.e.*, if it behaved as if it represented a perfectly competitive buying side of the market, then it would buy the quantity where demand and supply intersect, which is shown as Q_1 in the figure. The price that corresponds to this quantity is shown as P_1. This price-quantity combination maximizes social welfare, which is the sum of consumer surplus and producer surplus.[37] Consumer

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David L. Kaserman, *The* Albrecht *Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981) (criticizing prohibition of maximum resale price fixing).

[31] *See infra* text accompanying notes 194-221.

[32] For a careful examination of what the term "market power" means in antitrust parlance, see Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Cases*, 76 GEO. L.J. 241 (1987); William M. Landes & Richard M. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

[33] E.T. SULLIVAN & JEFFREY HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 242-43 (1988).

[34] *See* R. POSNER & F. EASTERBROOK, *supra* note 11, at 148-50.

[35] In Figure 1, supply is upward-sloping. If the suppliers experience diminishing returns to scale, their costs will increase as output expands. As a result, the firm will expand output only in response to increased prices.

[36] For expositional convenience and because most cases involve intermediate goods, we have developed our model for an intermediate good. The analysis, however, is perfectly generalizable and applies whenever competitive sellers deal with a single buyer. *See* WALTER NICHOLSON, MICROECONOMIC THEORY 516-19 (3d ed. 1985).

[37] Consumer surplus represents the difference between what consumers are *willing*

surplus is the area under the demand curve and above P_1. Producer surplus is the area above the supply curve and below P_1. Absent monopsony power, the forces of supply and demand will lead to a maximization of social welfare.[38]

FIGURE 1
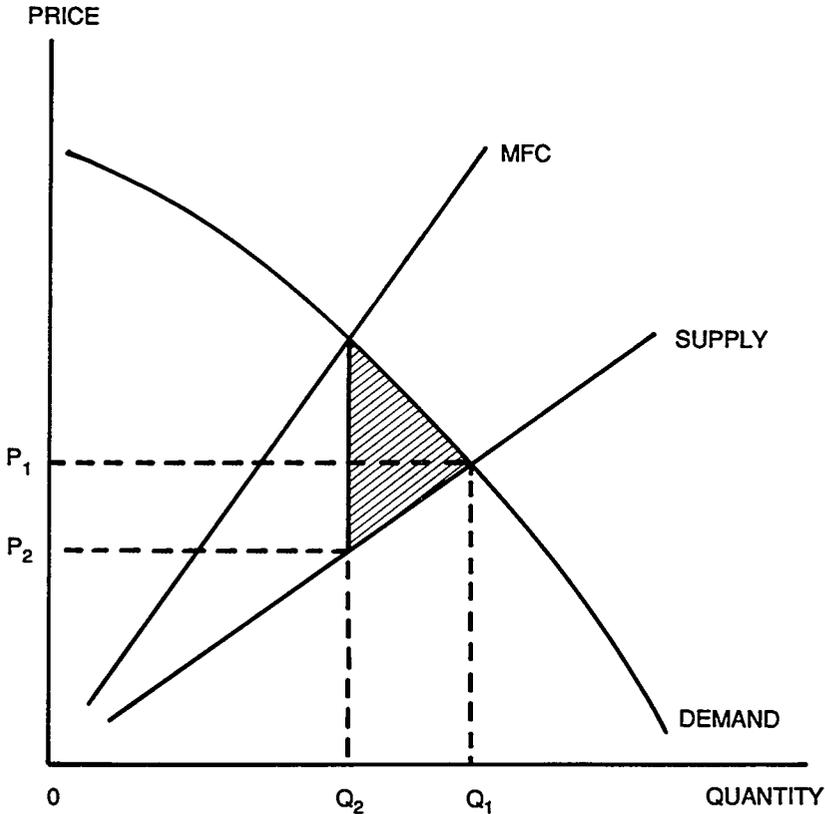
The monopsonist will not behave like a group of buyers in competition because such behavior conflicts with its desire to maximize its profit. Because the monopsonist can influence the market price of the intermediate good, the monopsonist will consider this power

to pay for a good and what they have to pay in the market. Producer surplus analogously represents the difference between the price that producers are willing to accept and what they receive in the market. *See* HAL VARIAN, INTERMEDIATE MICROECONOMICS 258-60, 262-63 (1987).

   38   Social welfare is the intellectual foundation for the economist's preference for competition over other market structures. Once the total pie is maximized, distributional considerations can be resolved (in principle, at least) through transfer mechanisms such as taxes and subsidies. *See* J.P. GOULD & C.E. FERGUSON, MICROECONOMIC THEORY 444 (5th ed. 1980) (benefits of competition). On distributional issues, see ANTHONY B. ATKINSON & JOSEPH E. STIGLITZ, LECTURES ON PUBLIC ECONOMICS 259-92 (1980).

when making its decisions on the quantities of inputs to employ. As a result, it will buy where the increase in total cost resulting from the purchase of one additional unit of the input—marginal factor cost (MFC)—intersects with demand.[39] Consequently, it will purchase quantity Q_2. Instead of paying a price of P_1 for the intermediate good, it will pay P_2, which is the lowest price at which the sellers will provide quantity Q_2.

The social welfare effects of monopsony are analogous to those of monopoly—too few resources will be employed in the production of the intermediate good.[40] At the point where supply intersects with demand, the value of the intermediate good, as measured by the demand price, equals the cost to society of providing that quantity as measured by the supply price. At this point, the employment level is optimal in a *social* sense because all of the gains from trade have been realized, and total welfare is maximized. But the monopsonist will not hire this number of units because it is not *privately* optimal to do so. Private profit maximization will lead the monopsonist to employ the smaller quantity Q_2. As a result, too few resources will be employed—the value of the intermediate good, given by the height of the demand curve, exceeds the social cost, measured by the height of the supply curve.[41] This means that the monopsonist will forgo potential gains from trade opportunities. In other words, the monopsonist's restricted hiring decision diminishes social welfare. The welfare loss is the striped triangular area in Figure 1.

2. *The Impact of Monopsony on Output Prices*

Since the monopsonist extracts a lower price from its suppliers, it is tempting to infer that the monopsonist's costs will drop and consumers will benefit through lower prices on the monopsonist's

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[39] The marginal factor cost (MFC) curve takes into account the increase in price that must be paid when the supply curve is positively sloped and purchases expand. *See* R. BLAIR & D. KASERMAN, *supra* note 12, at 35-37; ROGER D. BLAIR & LAWRENCE W. KENNY, MICROECONOMICS WITH BUSINESS APPLICATIONS 375-78 (1987).

[40] The antitrust laws do not appear to forbid what one may term "natural" monopsony, *i.e.*, the existence of a single buyer due to circumstances beyond the buyer's control. This is appropriate since the buyer cannot do much about the fact that no one else wants to buy the product in question and, therefore, there will be no practical remedy. Collusive monopsony is another matter. *See infra* text accompanying notes 65-72.

[41] This difference between the marginal value of an input to an employer and the price paid for the input led Joan Robinson to complain about "monopsonistic exploitation." *See* JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 293-96 (1933). Her complaint was that workers who were not paid a wage equal to their full value to the employer were being exploited in the sense that the large employer could retain part of the value contributed by the worker. *See* J. GOULD & C. FERGUSON, *supra* note 38, at 400-01.

output. This is precisely the mistake that the *Balmoral* court made.[42] The monopsonist does *not* pass on these lower costs because the relevant costs for pricing decisions are marginal costs, and these are not lower. This seems counter-intuitive, but comparing a monopsonist with a competitive buyer unclouds intuition. In both instances, we assume initially that the firm is in a competitive final goods market as a seller.

First, consider a monopsonist. A textile mill in an isolated town in North Carolina may be a small player in the competitive textile market but still have monopsony power in the local labor market. In this case, the firm's optimal employment decision requires that $P \times MP_L = MFC_L$,[43] where P denotes the price of the monopsonist's *output*, MP_L represents the marginal product of labor (the addition to total output that results from employing an additional unit of labor), and MFC_L is the marginal factor cost of labor (the increase in total expenditures on labor that results from employing an additional unit of labor). In effect, the firm will hire an additional worker as long as the market value of the incremental output that worker generates exceeds the incremental cost of hiring that worker. We also know from standard economic theory that competitive firms produce at the point where output price equals the marginal cost of production.[44] We can see what this means in the current context by rearranging the condition above. Dividing both sides of the equation by MP_L, we have $P = MFC_L/MP_L$. This means that the firm's marginal cost must be equal to the right-hand side of this second equality.[45]

We can compare this result with that of a textile mill that must

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[42] Recall that the *Balmoral* court thought monopsony power might result in lower ticket prices to the moviegoers and thereby "serve rather than undermine consumer welfare." Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 313, 316 (6th Cir. 1985).

[43] If this firm employs labor (L) and capital (K) in producing its final output (Q), which it sells at a price of P, the firm's profit (Π) function can be written as

$$\Pi = P \times Q - wL - rk$$

where w and r denote the wage rate and the price of capital, respectively. A profit-maximizing firm will hire labor to the point where any further increase in labor yields no incremental profit:

$$\frac{\partial \Pi}{\partial L} = P\frac{\partial Q}{\partial L} - (w + L(\partial w/\partial L)) = 0$$

Since $\partial Q/\partial L$ is defined to be the marginal product of labor and $(w+L(\partial w/\partial L))$ is the marginal factor cost of labor, we have the resulting expression in the text.

[44] This is a well-known result. *See* R. BLAIR & D. KASERMAN, *supra* note 12, at 7-9; E. SULLIVAN & J. HARRISON, *supra* note 33, at 19-22.

[45] This makes good sense: the numerator is the incremental input expenditure necessary to expand employment and the denominator is the incremental output generated by the expanded employment. The ratio is the incremental cost of output, which is the definition of marginal cost. For a rigorous derivation, see C.E. FERGUSON, THE NEO-CLASSICAL THEORY OF PRODUCTION AND DISTRIBUTION 176-78 (1971).

compete in both the output market and in the labor market. In this case, the firm faces a constant wage rate regardless of the amount of labor it employs. In effect, MFC is constant and equal to the wage. Thus, the firm's optimal hiring decison requires that $P \times MP_L = w$[46] where w is the wage rate. Put differently, the firm will hire an additional worker as long as the market value of the incremental output that worker generates exceeds the wage rate. Again, rearranging this equality by dividing both sides by MP_L yields $P = w/MP_L$, which means that the marginal cost for this firm is w/MP_L.

We bave seen from Figure 1 that the MFC for a monopsonist exceeds the competitive wage rate, *i.e.*, MFC_L is greater than w. Consequently, the marginal cost for the monopsonist (MFC_L/MP_L) is actually *larger* than the marginal cost for a firm with no monopsony power (w/MP_L). Since marginal cost drives the firm's output decision, the monopsonist will actually reduce its output below the level that a seller without monopsony power would select. This output reduction by one firm in a competitive market will have no impact on the market price. The monopsonist will sell its output at the market determined price. Thus, the decrease in the input price to the monopsonist is not passed on to consumers.[47]

, Suppose, however, that our textile mill produces a unique product and, as a consequence, enjoys some market power[48] in the sale of its output. This means that the monopsonist faces a negatively sloped demand curve in its output market.[49] Since the profit-maximizing output is determined by the intersection of the marginal cost and marginal revenue curves[50] and marginal revenue declines

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[46] In this case, the profit function looks the same as in *supra* note 43, but the wage rate does not change in response to changes in this firm's hiring decision. As a result, $\partial w/\partial L$ equals zero and profit maximization then requires that

$$\frac{\partial \Pi}{\partial L} = P\frac{\partial Q}{\partial L} - w = 0,$$

which provides the expression in the text.

[47] Since the actual price paid for the input falls, the firm's *average* cost falls. This, however, will not be passed on to consumers in the form of lower output prices. Instead, it will be retained as profit by the firm. If the output market is competitive as we have assumed in the text, the monopsonist will sell its reduced output at the market-determined price. If the monopsonist has any power in the output market, its reduction in output will cause the output price to rise. Thus, the effect of monopsony on average cost similarly has no salutory effect on output price.

[48] For sources that examine market power in antitrust, see *supra* note 32.

[49] When a seller has market power, it can control price by adjusting its output. *See* Krattenmaker, Lande & Salop, *supra* note 32.

[50] For a firm with market power, the output price is a declining function of the quantity sold; *i.e.*, the demand is negatively sloped. The firm's profit function is

$$\Pi = P(Q) \times Q - wL - rK$$

The firm must expand its employment of labor until the marginal impact on profit is zero:

as output expands,[51] an increase in marginal cost will result in a *decrease* in the firm's profit-maximizing output. Since the demand curve has a negative slope, a decrease in quantity leads to an *increase* in price. Thus, when a firm with some market power in the sale of its product acquires monopsony power in the purchase of its inputs, the prices paid for those inputs decrease, but the *marginal* cost of production rises, the monopsonist's output falls, and the price to its customers actually increases.

In sum, monopsony power is to the demand side of a market what monopoly power is to the supply side. Monopoly power is marked by the ability of sellers to raise price above competitive levels, which requires the ability to limit output. Monopsony power involves the ability of buyers to lower input prices below competitive levels, which requires the ability to restrict the quantity demanded of the input. In either case, the quantity that would be exchanged is less than the quantity exchanged under competitive conditions, and the result is allocatively inefficient.[52] Ironically, the reduced input prices the monopsonist enjoys do not lead to reduced output prices. In fact, when the monopsonist has market power in its output market, the reduced input prices cause *higher* output prices.

B. The Antitrust Response to Pure Monopsony

As we have seen, monopsony power leads a profit-maximizing firm to restrict the quantity employed of an input, thereby reducing

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$$\frac{\partial \Pi}{\partial L} = (P(Q) + Q \frac{\partial P(Q)}{\partial Q}) \frac{\partial Q}{\partial L} - (w + L(\partial w / \partial L)) = 0$$

Rearranging algebraically yields

$$P(Q) + Q \frac{\partial P(Q)}{Q} = \frac{w + L(\partial w / \partial L)}{\partial Q / \partial L}$$

or in more familiar terms

$$MR = \frac{MFC}{MP_L}$$

where MR is marginal revenue, MFC is marginal factor cost, and MP_L is the marginal product of labor. The right-hand side is marginal cost. *See supra* note 45 and accompanying text.

[51] Marginal revenue is the change in total revenue when quantity is changed by a small amount. Since total revenue is price times quantity, $TR = PQ$, marginal revenue is $\partial TR / \partial Q = P + Q \partial P / \partial Q$. If demand is negatively sloped, as it must be when the seller has market power, $\partial P / \partial Q$ must be negative. Thus, marginal revenue $(P + Q \partial P / \partial Q)$ must be below price (P). As price declines with increases in output, marginal revenue must also decline. More formally, the slope of MR is given by $\partial MR / \partial Q$ or $\partial (P + Q \partial P / \partial Q) / \partial Q = 2 \partial P / \partial Q$, for a linear demand curve, which is negative since $\partial P / \partial Q$ is negative.

[52] Allocative inefficiency occurs when too few resources are devoted to an activity: too little output is produced by a monopolist and too few inputs are hired by a monopsonist. On the allocative inefficiency of monopoly, see R. BLAIR & D. KASERMAN, *supra* note 12, at 35-37. The allocative inefficiency of monopsony is the subject of this section.

social welfare. The question thus arises whether an antitrust remedy exists for nonabusive monopsony conduct.[53] The simple answer is "probably not." Consider the case of a "natural" monopsony, where productive efficiency requires that there be a single buyer of an input.[54] If this buyer makes its purchase decisions according to the model developed above, only a restructuring of the demand side of the market could prevent welfare losses due to allocative inefficiency.[55] This solution, however, is not productively efficient; restructuring would impose welfare losses of uncertain magnitude.[56] Accordingly, following conventional economic reasoning, one cannot advocate such a solution. An analogous situation is that of a natural monopoly that emerged because of economies of scale.[57] Structural relief is undesirable in this context because it would result in productive inefficiency. Just as section 2 of the Sherman Act[58] does not forbid the structural condition of monopoly, it should not forbid the structural condition of monopsony.

There is another possible remedy for nonabusive monopoly or monopsony: permit the monopoly or monopsony to exist, but regulate prices. Section 2 of the Sherman Act prohibits only abuses of power.[59] The question then arises: In cases of either monopoly or monopsony, would it be an abuse of market power to use that power merely to influence price? Both practical and theoretical reasons suggest that section 2 should not prohibit price-only effects. As a practical matter, such a response would require a court to venture

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53 By nonabusive we mean conduct that involves the elimination of competitors solely by means of product superiority.

54 This is analogous to a natural monopoly where productive efficiency requires that a single firm produce the total output of the market. Familiar examples include local telephone service, cable television, and electric power generation and distribution. *See generally* SANFORD V. BERG & JOHN TSCHIRHART, NATURAL MONOPOLY REGULATION (1988).

55 In other words, a single, large employer could be dismantled into small units to eliminate its buying power. But this restructuring is apt to introduce productive inefficiencies since there is an efficiency rationale for the existence of a single, large buyer.

56 A single employer may have monopsony power in a local input market, but sell its output in a competitive national market. Imposing inefficiency upon such a firm would raise its costs, render it uncompetitive, and perhaps lead to insolvency.

57 *"Natural monopoly* generally refers to a property of productive technology, often in conjunction with market demand, such that a single firm is able to serve the market at less cost than two or more firms." DANIEL SPULBER, REGULATION AND MARKETS 3 (1989) (emphasis in original); *see also* S. BERG & J. TSCHIRHART, *supra* note 54.

58 Section 2 of the Sherman Act provides: "[e]very 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 (1988).

59 *E.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). *See generally* 3 P. AREEDA & D. TURNER, *supra* note 10, ¶ 710.

beyond its traditional, limited role and actually engage in price regulation.[60] As a theoretical matter, it is the lure of supercompetitive profits accompanying the exploitation of market power that ultimately leads to a dilution of monopoly or monopsony power by encouraging new firms to enter an industry.

As a matter of law, merely charging a monopoly price does not constitute an abuse of monopoly power.[61] The same reasoning has been applied to the use of monopsony power to lower price. For example, in *Kartell v. Blue Shield*,[62] the court characterized Blue Shield as a buyer of physician services. A group of physicians challenged Blue Shield's use of market power as a buyer on the grounds that Blue Shield could set rates *below* levels that would exist in a "freely competitive market."[63] Judge Breyer, writing for the First Circuit, noted the general judicial reluctance to monitor price in cases involving monopoly sellers. He then extended that reluctance to a monopsony buyer in holding that Blue Shield's conduct did not constitute a violation of the antitrust laws.[64]

C.   Collusive Monopsony[65]

In some markets, there are a few large buyers rather than a pure monopsonist. Economists label this market structure "oligopsony." Just as oligopoly on the selling side can lead to collusion with results similar to those created by monopoly, oligopsony can lead to collusion among the few buyers in a market, with results similar to those produced by monopsony. Acting together, these buyers might collude on terms and depress the price of one or more key inputs used in their production processes.[66] Consequently, collusive monopsony has the same deleterious effects on social welfare as does pure monopsony: too few resources will be employed. Abused suppliers are hurt by a collusive restraint that reduces the price their output commands. Moreover, since the suppliers provide less of their product, the quantity produced of the final good must also decline.[67] Consequently, such restraints subtract from social welfare and should be condemned.

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60   *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

61   *See* sources cited *supra* note 59.

62   749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985).

63   *Id.* at 926.

64   *Id.* at 927-28.

65   Section 1 of the Sherman Act prohibits combinations "in restraint of trade." 15 U.S.C. § 1 (1988).

66   The buyers' motivation for colluding, of course, is to obtain greater profits. In other words, the buyers want to convert some producer surplus into consumer surplus. In Figure 1, the rectangle that is P_1-P_2 high and $0Q_2$ wide represents producer surplus that has been converted into consumer surplus by the collusion.

67   *See, e.g.*, National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965).

The NCAA and major league baseball provide two interesting examples. The NCAA's membership constitutes most of the colleges and universities that participate in iutercollegiate athletics. Member schools make collective decisions on a variety of issues. The NCAA has imposed limitations on the number of scholarships offered (*i.e.*, the quantity) and the compensation that can be offered (*i.e.*, the price) to college athletes.[68] Thus, under the auspices of the NCAA, collusion among these putative rivals has reduced the quantity and price of a major input used in the production of the members' final output, college sports.[69]

Similarly, major league baseball owners legally can agree on the maximum number of players that each team may carry on its active roster.[70] Recently, they voted to reduce the roster size from twenty-five to twenty-four, thereby depressing the number of players employed in major league baseball.[71]

In contrast to pure monopsony, collusive monopsony does not entail a structural imperative. Rather, collusive monopsony is a behavioral problem that can be regulated by the usual antitrust weapons. Indeed, the Supreme Court has held that collusive monopsony violates section 1 of the Sherman Act.[72]

III
MONOPSONISTIC ABUSES[73]

A monopsonist or a group of firms collectively possessing monopsony power may use that power to influence a term of excbange other than price. Thus, in this Part we will examine both price and nonprice effects of monopsony. We have four objectives. First, we demonstrate that courts have generally reached economically sound results even while following the bright-line tests of past antitrust policy, which were not based on economic analysis. Second, we demonstrate that economic analysis supports these judicial out-

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[68]   *See* Becker, *supra* note 2.
[69]   Unlike most cartels, the NCAA can impose severe financial penalties upon members that do not comply with the restrictions. Schools can be banned from participating in bowl games and performing on television—two lucrative sources of revenue. For a second offense, the NCAA may impose the "death penalty"; a school may be banned from participating in a particular sport for up to two years. For these and other penalties, see Article 19.4 in the 1990-91 NCAA MANUAL (1990).
[70]   JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 480-500 (1979).
[71]   Roster sizes were temporarily raised to 27 in the aftermath of the 1990 lockout and are scheduled to return to 25 for the 1991 season. *Bring Back the Lockout!*, SPORTS ILLUSTRATED, Apr. 9, 1990, at 20.
[72]   *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).
[73]   The term "monopsonistic abuses" herein indicates either activity by a monopsonist that wonld violate section 2 of the Sherman Act or activity by colluding bnyers that would violate section 1 of the Act.

comes. In so doing, we show that abusive monopsonists do not behave precisely as the traditional model predicts. Third, we identify contexts warranting greater attention to the long-run effects of monopsony. Finally, we expose substantive and procedural pitfalls created by inattention to the economic consequences of monopsony.

A. Price Effects

1. *Classical Model*

Recall that nonabusive purchasing decisions made by a single monopsonist who is fully aware of their impact traditionally do not violate the antitrust laws.[74] Collusion among buyers, however, triggers section 1 of the Sherman Act. For example, in the leading collusive monopsony case, *Mandeville Island Farms v. American Crystal Sugar Co.,*[75] sugar refiners in northern California agreed to adopt a pricing formula that resulted in uniform price offers for sugar beets. This practice reduced the average price paid to sugar beet growers to a level below that which would have prevailed in the absence of the agreement. In finding the agreement unlawful, the United States Supreme Court cited the general per se illegality of price-fixing agreements and concluded that: "It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."[76]

Mandeville Farms is a clear example of a collusive monopsony practice that has the economic results predicted by traditional theory. It is important to note, however, that if the case were reconsidered today, a court examining the effect of the collusive effort might conclude that, since prices dropped, the eventual outcome could be beneficial to consumers.[77] This shortsighted impact analysis could result in a finding of no substantive violation or that the plaintiff-sellers had suffered no antitrust injury.[78]

2. *Inelastic Supply*[79] *and Perishable Commodities*

The response of a collusive monopsony to inelastic short-run

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74   *See supra* notes 53-64 and accompanying text.
75   334 U.S. 219 (1948).
76   *Id.* at 235 (footnotes omitted).
77   Recall the similar reasoning in Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 313 (6th Cir. 1989). *See supra* notes 19-22 and accompanying text.
78   Antitrust injury is the harm that flows from the anticompetitive consequences of an antitrust violation. Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477 (1977). For a more complete analysis of antitrust injury, see *infra* text accompanying notes 194-221.
79   When supply is perfectly inelastic, the quantity does not adjust when price

supply is similar to that predicted by the traditional model. With an inelastic short-run supply, the free interaction of supply and demand would result in a price increase in the event of a shortage. One of the earliest collusive monopsony cases involved the fixed supply model.

In *National Macaroni Manufacturers Association v. FTC*,[80] the Seventh Circuit held that an attempt by a buying cartel of macaroni manufacturers to control the price paid for one of its primary inputs was unlawful. High quality macaroni requires the use of one hundred percent durum wheat, which is easy for the manufacturers to use and yields a macaroni product with the most desirable cooking properties.[81] In the absence of any supply disruptions, the intersection of demand and supply determines the free market equilibrium price and quantity of durum wheat. In Figure 2, this intersection occurs at price P_1 and quantity Q_1. The original supply curve is drawn as a vertical line at quantity Q_1 reflecting that, during a growing season, the maximum quantity supplied cannot respond to changes in price.[82]

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changes, *i.e.*, the quantity supplied is completely unresponsive to changes in price. *See* RICHARD G. LIPSEY, PETER O. STEINER & DOUGLAS D. PURVIS, ECONOMICS 89 (8th ed. 1987).

  80   345 F.2d 421 (7th Cir. 1965).
  81   *Id.* at 424.
  82   This is not strictly accurate since a rise in price may spur more careful tending or make more intensive harvesting profitable, but characterization of short-run supply as inelastic is a useful approximation.

FIGURE 2

PRICE

SUPPLY AFTER
CROP FAILURE

SUPPLY

P_2

P_1

DEMAND

COLLUSIVE
DEMAND

0   Q_2 Q_1 TONS OF DURUM WHEAT
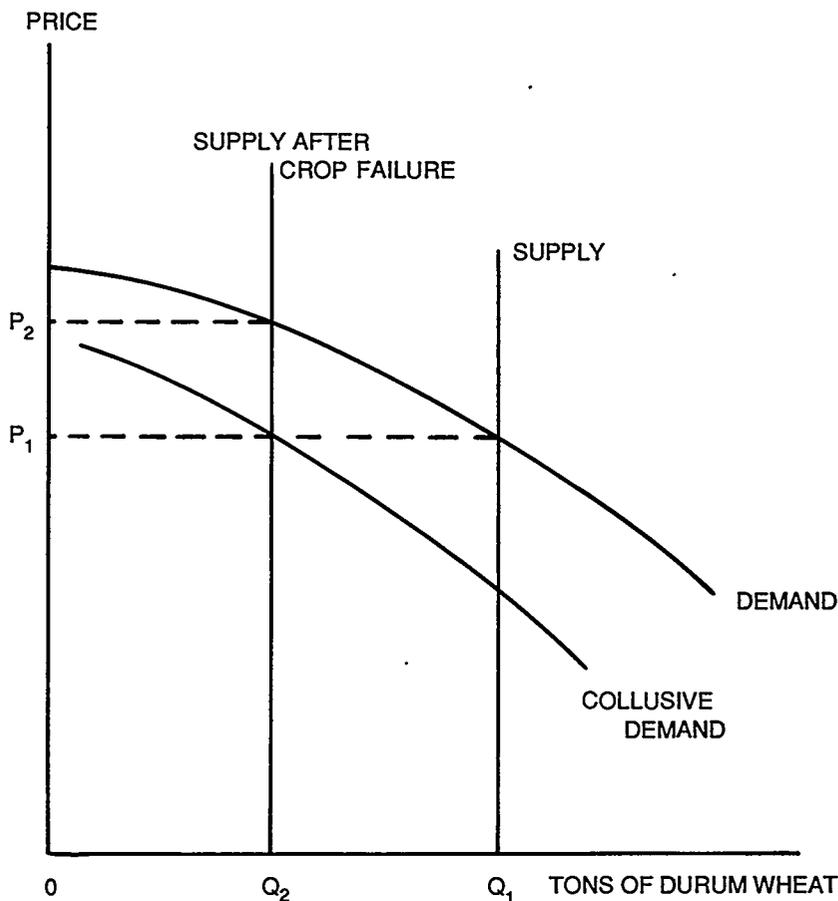
During the relevant growing season in *National Macaroni*, major
crop damage curtailed the supply of durum wheat. The maximum
supply fell to Q_2.[83] Unfettered competition among buyers for the
reduced quantity of durum wheat should have driven the price up to
P_2. But this result did not occur.

The macaroni manufacturers agreed among themselves to alter
their recipe. Instead of using 100 percent durum wheat, they
agreed to use a blend of 50 percent durum wheat and 50 percent
farina.[84] The agreement artificially depressed the demand for du-
rum wheat to the "collusive demand" level, thereby maintaining the
original price.[85] The Seventh Circuit found that the agreement was
a per se violation of section 5 of the Federal Trade Commission

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[83] The supply curve after the crop damage is shown as one-half of the pre-failure
supply. We use this for illustrative purposes.
[84] *National Macaroni*, 345 F.2d at 424.
[85] *Id.* at 426.

Act.[86] This holding provided symmetrical treatment of collusive monopoly and monopsony behavior. When sellers generate a surplus, the supply may be so great that prices and resulting profits fall. The antitrust laws do not permit these sellers to collude in order to boost their prices and profits. Similarly, *National Macaroni* teaches that when shortages increase prices and perhaps profits, buyers may not collude to reduce those prices.

a. *The Role of Perishability*

In our analysis of *National Macaroni*, we assumed that the sellers had a perfectly inelastic supply curve. This assumption is inaccurate if the farmers had the option of withholding some output from the market in hopes of higher prices in future years.[87] Our analysis is entirely appropriate, however, for cases involving perishable commodities. Perishability makes short-run supply perfectly inelastic because restricting output involves no cost savings. The protracted litigation between beef producers and grocery store chains and the continuous controversy surrounding the free-agency rights of professional athletes both illustrate the perishability concept. In *In re Beef Industry Antitrust Litigation*,[88] the plaintiff-beef producers alleged that grocery store chains were colluding to depress the price of beef.[89] The plaintiffs noted that the supply of beef was fixed in the short run because a fattened steer must be sold within three weeks of the time it becomes "choice grade."[90] This left the plaintiffs completely unable to withhold output in response to a collusively determined price. The problem in this case did not involve a shortage but merely a fixed supply.[91] In other words, the supply curve would be vertical at quantity Q_2 in Figure 2. Once again, the alleged collusion was desigued to move the demand curve to a lower level, thereby decreasing the price.[92]

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[86] *Id.* at 427. Section 5 of Federal Trade Commission Act prohibits "[u]nfair methods of competition." 15 U.S.C. § 45 (1988).

[87] This option is not free, of course, since one must incur storage costs. Moreover, sales revenue received in the future must be discounted to present value.

[88] 542 F. Supp. 1122 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984). The issue on appeal was whether the producers of beef, who were indirectly affected by the alleged bid rigging, had antitrust standing.

[89] The beef producers also accused the beef packers of a similar conspiracy. *In re* Beef Indus. Antitrust Litig., 1986-2 Trade Cas. (CCH) ¶ 67,277 (S.D. Tex. 1986).

[90] *Id.*

[91] Similar analysis applies to poultry, other livestock, fish, and ripened fruits. Consider the options available to a tuna boat, for example, as it pulls into port. If the canneries collude on price, the vessel owner has almost no options. All costs are sunk and any positive price is preferable to throwing the fish away.

[92] Although the court was not persuaded by the cattle ranchers, some economists have confirmed these price effects. For example, Professor Bruce Marion of the University of Wisconsin has pointed to research showing that concentration among buyers has

A similar, but more severe, problem confronts professional athletes and other workers. Labor is an extremely perishable commodity—an hour not worked today can never be recovered. Although professional athletes have alternative occupations, those with real talent are so scarce that their wages as athletes are generally well above the wages available in their next most lucrative endeavor. Accordingly, the supply of labor effort for each individual athlete is quite inelastic. Collusion among employers can drive the wage down to the individual's reservation wage.[93] The purpose of the baseball owners' agreement to prohibit free agency is to insure that they will be able to behave as a collusive monopsony in the market for professional athletes' services.[94]

b. *The Prevalence of Bid Rigging*

Bid rigging appears to be an especially popular form of collusive monopsony in circumstances of inelastic supply. In addition to bid rigging among antique dealers at estate auctions,[95] collusive arrangements have emerged at auctions of used commercial equipment in Pennsylvania[96] and California.[97] In these cases, putative rival buyers agree in advance not to bid against each other at public auctions.[98] Given the inelastic supply of antiques or used commercial equipment, the winning "bidder" can offer a low price with the assurance that no one else will offer a higher price.[99] Following the public auction, the bid riggers conduct a private auction among

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reduced prices to cattle farmers. In light of this research, Professor Marion has asserted that this monopsony can result in substantial underpayment to farmers. *Witnesses Differ on Effect of Increased Concentration in Food Sector*, 54 Antitrust & Trade Reg. Rep. (BNA) 819, 820 (May 12, 1988).

[93] *But see* Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

[94] The best known challenge to this practice is Flood v. Kuhn, 407 U.S. 258 (1972).

[95] *See supra* note 5 and accompanying text; *see also Antique Dealers Face Price Fixing Charges*, 53 Antitrust & Trade Reg. Rep. (BNA) 117, 117 (July 23, 1987) (Charles F. Rule reported that the Antitrust Division of the Department of Justice had "a number of investigations focusing on auction pools in a variety of commodity areas").

[96] United States v. Perfection Mach. Sales, Inc., Crim. No. 88-00281 (E.D. Pa. July 18, 1988).

[97] United States v. Perfection Mach. Sales, Inc., Crim. No. 88-0391 RFP (N.D. Cal. June 22, 1988).

[98] This raises the interesting question of how entry is prevented. In the case of the antique auctions, for example, the large antique dealers were involved but not the amateur collectors. What prevented the amateurs from bidding more than the professionals? There are at least two possible explanations. First, it may be true that the antique dealers can bid higher than the collectors and still resell for a profit in the national antique market. Second, the dealers are better able to estimate the value of the antiques for sale. If the amateur collectors undervalue the antiques, then the professionals can profit. Obviously, the opposite can occur: an amateur may overestimate the true market value of an item. In that case, the professionals will not be able to buy it.

[99] No one in the buying cartel can cheat for long on his fellow conspirators by

themselves. On each unit purchased, the difference between the winning bid in the private auction and the rigged bid in the public auction provides a pool of collusive profits. These profits are shared among the collusive monopsonists in proportions that cannot be determined on an *a priori* basis.[100] The result of such bid rigging is to deny the prior owners the full market value of their goods.

"Split" agreements among movie theatres supposedly in competition provide another example of bid rigging.[101] Competitive bidding among exhibitors (*i.e.*, the movie theatres) for soon-to-be released films could result in large cash guarantees, high license fees, and other terms unfavorable to the exhibitors. To avoid such an outcome, the theatres may agree to refrain from competing with each other, *i.e.*, to "split" the films among themselves. Their intention, of course, is to obtain the same number of films, but on more favorable terms.[102]

A final example of bid rigging is the timber auction in *United States v. Portac, Inc.*[103] In *Portac*, the U.S. Forest Service decided to auction off timber on forest service land. The Astoria Plywood Corporation "won" the sale due to an agreement providing that the other potential bidders would refrain from competing. The logs from the sale were subsequently allocated among the conspirators and Portac, a sawmill company. The buyers' purpose, once again, was to keep input costs down, resulting in the denial of full value to the seller.

c. *Long-Run Welfare Consequences of Collusion in the Context of Inelastic Supply*

We have already demonstrated that the efforts of collusive monopsonists to obtain lower prices do not translate into lower prices for consumers.[104] Further economic consequences, however, particularly in the context of inelastic supply, require specific atten-

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offering a higher price. Such behavior would be detected immediately and would cause the cartel to collapse.

100   Any profit-sharing rule could be used, provided that it did not lead to so much dissatisfaction among the colluders that the buying cartel would break down. There is no unique profit-sbaring rule to guarantee cartel stability. FREDERICK M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 248 (3d ed. 1990).

101   For examples, see Movie 1 & 2 v. United Artists Communicatures, Inc., 909 F.2d 1245 (9th Cir. 1990); Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 313 (6th Cir. 1989); Southway Theatres v. Georgia Theatre Co., 672 F.2d 485 (5th Cir. 1982); United States v. Capitol Serv. Inc., 568 F. Supp. 134 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985).

102   The Antitrust Division has begun to file *criminal* cases involving splits. *See, e.g.*, United States v. Cinemette Corp. of Am., 687 F. Supp. 976 (W.D. Pa. 1988).

103   869 F.2d 1288 (9th Cir. 1989).

104   *See supra* text accompanying notes 42-52.

tion. Since supply is inelastic, the collusion among buyers will have little impact on quantity in the short run. Thus, in these circumstances, collusion among buyers to depress demand artificially has only distributional significance in the short run. In the durum wheat example in Fignre 2, since the quantity is fixed at Q_2 after the crop failure, the effect of collusion is to redistribute wealth: suppliers will receive less for their wheat. Instead of receiving P_2Q_2 dollars for the crop, farmers will receive only P_1Q_2. The difference, $(P_2-P_1)Q_2$, provides a return to the colluders.

Ordinarily, economic objections to collusion do not involve distributional issues; this is true here as well.[105] But collusion creates expectations that have long-run significance. As their profits are reduced by collusion, the producers' incentives to plant durum wheat diminish and they will curtail supply in the future.[106] Such reductions in supply entail adverse consequences for consumer welfare in the future.

This analysis suggests that the *National Macaroni* decision, which reached its result by adhering to the bright-line test prohibiting price fixing, is sensible even under modern economic analysis. It implicitly recognizes that, even in cases where supply is fixed and reductions in quantity are not possible in the short run, monopsonistic collusion harms consumers by reducing the producers' profits, causing them to reduce supply in the future. Consequently, such restraints decrease consumer welfare in the long run and should be prohibited.

3. *All-Or-None Supply Cases*

According to the classical model of monopsony, the monopsonist must reduce the quantity that it purchases in order to obtain lower prices. The monopsonist, however, would prefer to pay the lower price without reducing the quantity purchased. This is impossible unless the monopsonist can push the sellers onto their all-or-none supply curve.[107] Since this concept may be somewhat unfamiliar, we digress to give a brief explanation.

The standard supply curve reveals the answer to the following question: What is the quantity that suppliers will provide at a given price? By answering this question for various given prices, one obtains the price-quantity combinations that form the usual supply

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105   Others stress political concerns. *See, e.g.,* Robert Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979).

106   *See* MILTON FRIEDMAN, PRICE THEORY 118-20 (1976) (compact discussion of supply).

107   *Id.* at 16.

curve.[108] The choice confronting the seller is how much to supply at a particular price. The all-or-none supply curve, however, is a different matter. It answers the question: What is the maximum quantity suppliers will make available at each price when the alternative is to sell nothing at all?[109] Accordingly, the all-or-none supply curve lies below the standard supply curve.[110] Knowledge of the all-or-none supply curve enables the monopsonist to fully exploit its power by extracting all of the producer surplus.

Consider the demand that a group of firms have for a particular input, for example, the venerable widget, as shown in Figure 3. The usual supply curve of widgets is also shown. The interaction of this supply and demand determines an equilibrium price and quantity in a competitive widget market of P_1 and Q_1. Now, suppose that the buyers get together and exert their collective buying power over the diverse group of suppliers. One strategy would be to restrict purchases below Q_1 and thereby depress price below P_1. Alternatively, however, the buyers could impose all-or-none decisions upon the unorganized group of suppliers. In fact, they can push the suppliers off the traditional supply curve and onto the all-or-none supply curve at the quantity Q_1, which is the privately optimal quantity for the colluding buyers.[111] The price actually paid falls from P_1 to P_2 without any reduction in the quantity transacted.[112]

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[108]   *Id.* at 118.
[109]   P. RICHARD G. LAYARD & ALAN A. WALTERS, MICROECONOMIC THEORY 244 (1978) ("Lying below the supply curve is the seller's all-or-nothing price, showing the minimum price per unit at which he is willing to sell each quantity.").
[110]   *See* M. FRIEDMAN, *supra* note 106, at 118.
[111]   This is the privately (as opposed to socially) optimal quantity in the sense that the buyers' profits are maximized with quantity Q_1 and price P_2.
[112]   The success of this collusive effort hinges on the credibility of the threat to refuse to buy anything. With many sellers, such a threat may be perceived as credible because each seller knows that the buyer can turn to rival sellers. In contrast, if there were only one seller, the collusive threat to buy nothing at all would not be credible.

FIGURE 3
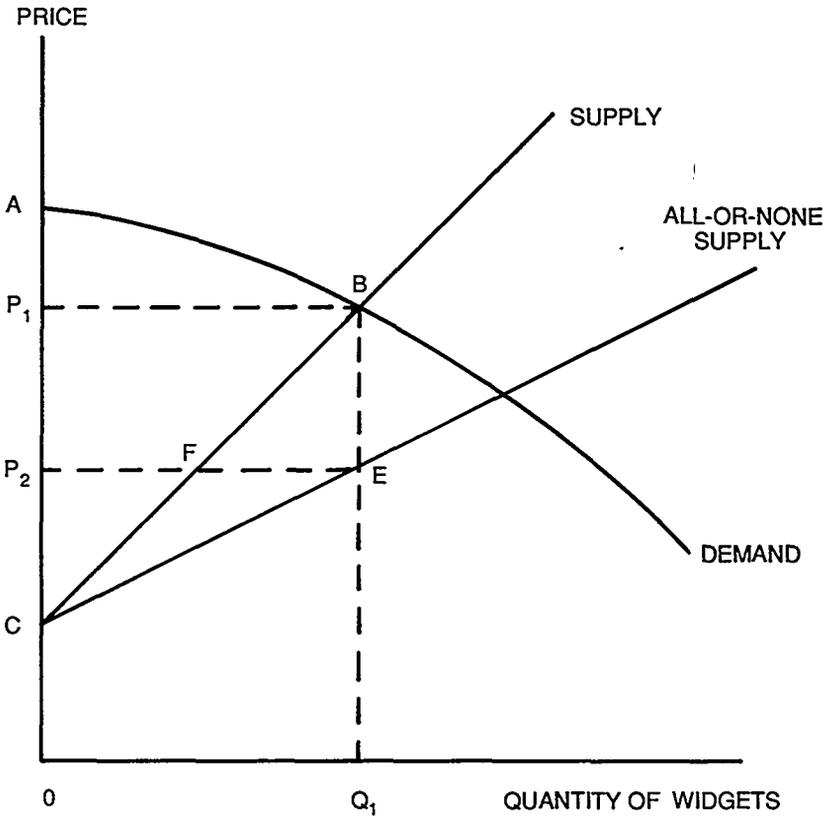
The short-run consequences of the all-or-none scenario are purely distributional, which is not to say they are unimportant.[113] All of the producer surplus is transferred to the colluding buyers. In Figure 3, the noncollusive consumer surplus is the area ABP_1, and the producer surplus is CBP_1. After imposing all-or-none conditions upon the suppliers, the collusive monopsonists increase their consumer surplus by the rectangular area P_1BEP_2. This comes at the expense of producers, whose producer surplus has been reduced by the same area.[114] Note that the area above the supply curve and below P_2 (*i.e.*, area CFP_2) is equal to area EFB, and therefore, producer surplus is zero.[115] Thus, the buyers have extracted

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113   For examinations of distributive issues, see Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Lande, *supra* note 93.

114   This can be proven with plane geometry. Triangles CFP_2 and EFB are similar right triangles. Since the bases P_2F and FE are of equal length, the triangles are congruent and, therefore, the areas are the same.

115   There is no producer surplus above the all-or-none supply curve. For example, area CEP_2 does *not* represent consumer surplus. The all-or-none supply represents—by construction—the supply response when all producer surplus has been removed.

all of the producer surplus through their collusive efforts. Although this type of collusion does not reduce output in the short run, it may in the long run. Firms will leave the industry in the long run if the price offered is below average total cost.

The all-or-none model seems to fit recent cases in which health care providers challenge the monopsonistic pricing practices of health care insurers.[116] The providers typically object to the maximum price the insurer has offered. The insurers probably prefer not to reduce the quantity of medical services available. The long run consequences are, however, difficult to predict. For example, in *Kartell v. Blue Shield*,[117] a group of physicians challenged the pricing policies of Blue Shield, which offered reimbursement on a take-it-or-leave-it basis.[118] The plaintiffs contended that the rates were set so low as to discourage entry into the physician services market.[119] If empirically accurate, this argument would support the possibility of long-run misallocative effects of monopsony pricing.

In a sense, this long-run effect may seem counter-intuitive because the monopsonist's interests are not served by pricing so low that there is a long-run exit of sellers.[120] In principle, this exit would alter the balance of bargaining power in favor of the remaining sellers.[121] Indeed, in a world of perfect information one might imagine the monopsonist pegging a price that permits just the right number of sellers to comfortably stay in business. This argument rests on unrealistic assumptions about the availabilty of information and the rationality of business conduct. Thus, in the context of real

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[116] *See, e.g.*, Kartell v. Blue Shield, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985); Medical Arts Pharmacy, Inc. v. Blue Cross, Inc., 675 F.2d 502 (2d Cir. 1982); Travelers Ins. Co. v. Blue Cross, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); Pennsylvania Dentist Ass'n v. Medical Serv. Ass'n, 574 F. Supp. 457 (M.D. Pa. 1983).

[117] 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985). Challenges such as this, brought under section 1 of the Sherman Act, usually fail because an insurer is a single buyer and can unilaterally shop for favorable terms. *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 251 n.27 (1988).

[118] *Kartell*, 749 F.2d at 923-24. Another example of an all-or-none situation appears to be All Care Nursing Serv. v. Bethesda Memorial Hosp., Inc., 887 F.2d 1535 (11th Cir. 1989).

[119] *Kartell*, 749 F.2d at 924.

[120] Whether such a strategy makes economic sense from a monopsonist's private perspective is revealed by the present value of the flow of benefits and costs. Since the costs of firms' exiting will be incurred in the distant future, they will be discounted far more heavily than will the immediate benefits of monopsonistic exploitation.

[121] This could eventually lead to something approximating bilateral monopoly, which poses a different set of problems. *See generally* Roger D. Blair & David L. Kaserman, *A Note on Bilateral Monopoly and Formula Price Contracts*, 77 AM. ECON. REV. 460 (1987); Roger D. Blair, David L. Kaserman & Richard E. Romano, *A Pedagogical Treatment of Bilateral Monopoly*, 55 S. ECON. J. 831 (1989); Richard Friedman, *Antitrust Analysis and Bilateral Monopoly*, 1986 WIS. L. REV. 873.

world business behavior, closer attention to long-run welfare consequences is warranted.

B. Nonprice Effects: The Abuse of Monopsonistic Leverage[122]

The purest monopsony cases, like *Mandeville Island Farms ·v. American Crystal Sugar, Co.*[123] and *National Macaroni Manufacturers Association v. FTC*,[124] involve efforts to control demand and lower prices. Just as in monopoly cases, there are instances in which the "abuse" of power is not designed to lower prices but to exact some other form of advantage for the monopsonist. For example, in the well-known "monopolization" case of *United States v. Griffith*,[125] the defendant operated a chain of movie theatres that purchased exhibition rights from film distributors. In some towns, the defendant was the only exhibitor; in others it faced competition.[126] It possessed monopsony power in the towns in which it faced no competition because it was the only buyer. The defendant made its purchases of film exhibition rights contingent on the distributors' agreement that the defendant would have exclusive rights to films in the markets in which it faced competition.[127] In essence, rather than use its monopsony power to demand the lowest possible rental fees in each market, the concession exacted was in the form of exclusive exhibition rights for the entire circuit. Monopsony power was used to enhance the buyer's monopoly in those markets where it faced competition as a seller. Without specifically noting the monopsony character of the power exercised, the United States Supreme Court held that the practice violated section 2 of the Sherman Act.[128]

The Supreme Court implicitly condemned the abuse of monopsony power again in *Klor's, Inc. v. Broadway Hale Stores*.[129] The defendant, Broadway Hale, owned a chain of department stores and used what the Court described as its " 'monopolistic' buying power" as a means of convincing several manufacturers of appliances not to deal with Klor's, a small, single-outlet retailer in competition with Broadway Hale.[130] Rather than concentrate its monopsony power on ob-

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122   *See* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985) (recent examination of monopoly leveraging). Although Professor Kaplow revives the traditional leverage theory whereby a firm uses power in one market to obtain power in another market, that is not our concern here. The cases in this section deal with the use of power as a buyer to gain power as a seller.
123   334 U.S. 219 (1948).
124   345 F.2d 421 (7th Cir. 1965).
125   334 U.S. 100 (1948).
126   *Id.* at 102.
127   *Id.* at 103.
128   *Id.* at 106-07.
129   359 U.S. 207 (1959).
130   *Id.* at 209-10.

taining the lowest possible price from the manufacturers, the "monopsonist" exacted a non-price concession in the form of a refusal to sell to a competitor. In an opinion that can be regarded as declaring group boycotts illegal per se,[131] the Court held the practice unlawful under section 1 of the Sherman Act.[132]

Similarly, in *FTC v. Motion Picture Advertising Service Co.*,[133] the defendant was a producer and distributor of advertising films shown at movie theatres. It bought time from theatres on the condition that they would not sell time to competing producers of advertising films.[134] In essence, the defendant required sellers to enter into an outputs contract under which all their advertising time was sold to the defendant.[135]

In *Griffith*,[136] *Klor's*,[137] and *Motion Picture Advertising Service Co.*,[138] monopsony power was not used to negotiate a lower price for the buyers.[139] Instead, the defendants used their monopsony power to curtail the availability of an input to their competitors, thereby enhancing the position of the defendants as sellers. The impact on the input markets seem to be purely distributive in conformance with the all-or-none model, while the more serious economic impact was probably on the output markets. In these instances, the Court reached outcomes consistent with established economic objectives by focusing on the results of increased monopoly power.

IV
MONOPSONY AND MERGER POLICY[140]

A monopsony issue in the area of *horizontal* mergers arises when one buyer acquires another, thereby increasing the possibility of an undesirable concentration of power on the buying side of the market.[141] The monopsony issue in the context of *vertical* mergers arises when a firm acquires one of its suppliers. The motivations

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131   *See* LAWRENCE SULLIVAN, ANTITRUST 236 (1977).
132   *Klor's*, 359 U.S. at 210.
133   344 U.S. 392 (1953).
134   *Id.* at 393.
135   The Court upheld an FTC order limiting the length of the contracts. *Id.* at 394-98.
136   334 U.S. 100 (1948).
137   359 U.S. 207 (1959).
138   344 U.S. 392 (1953).
139   *See also* Eastern States Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).
140   Section 7 of the Clayton Act prohibits mergers where the effect "may be to substantially lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1988).
141   *See supra* notes 42-52 (contending that concentrated buying power can have deleterious effects on price). *But see* 4 P. AREEDA & D. TURNER, *supra* note 10, ¶¶ 963-65 (expressing less concern about buying power than about selling power).

and the welfare significance of horizontal and vertical mergers, however, are quite distinct. Consequently, we will treat horizontal and vertical mergers separately in this section.[142]

A. Horizontal Mergers[143]

A series of horizontal mergers among firms that buy the same inputs may lead to a case of pure monopsony. In other instances, the merger may result in a dominant firm in a market with several smaller or fringe buyers. In both cases, the merger-to-monopsony need not involve monopoly in the output market.[144] For example, a series of mergers could result in a single exhibitor controlling all of the movie theatres in a geographic area.[145] One could argue that the single exhibitor has a monopsony in the area since no one else licenses movies, despite the existence of media substitutes (*i.e.*, television, radio, plays, concerts, shows, and the like), which effectively blunts the exhibitor's monopoly power.[146]

To keep the analysis focused, we shall assume monopsony power without any corresponding monopoly power. Even in this case, the merged monopsonist imposes welfare losses on society. Regardless of whether the result of the merger is a pure monopsony or the emergence of a dominant buyer,[147] the welfare consequences

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[142] Conglomerate mergers are irrelevant to the present discussion of monopsony.

[143] *See* 4 P. AREEDA & D. TURNER, *supra* note 10, ¶¶ 963-65 (brief treatment of buyer concentration).

[144] The Department of Justice Merger Guidelines proscribe mergers that create or enhance market power.

[145] This was an issue raised for the first time in a post-trial brief by the government in United States v. Syufy Enter., Inc., 712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990). *See infra* text accompanying notes 160-64 (discussion of *Syufy*).

[146] Since United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the relevant product in motion picture cases has been first-run exhibition of motion pictures. *See, e.g., Syufy*, 712 F. Supp. at 1397. *But see* Charles McCoy, *The Paramount Cases: Golden Anniversary in A Rapidly Changing Marketplace*, ANTITRUST, Summer 1988, at 32-35 (calling for a rethinking given modern realities).

[147] A series of mergers is more likely to produce a dominant buyer than a pure monopsonist. The welfare effects, however, do not vary depending on the ultimate market structure. A dominant buyer recognizes that its purchase decisions influence the market price of some input. The fringe of competitive buyers accepts the price that the dominant firm pays as the market determined price. That fringe group of buyers will buy the input up to the point where its demand equals the price set by the dominant buyer. The dominant buyer must adjust its purchases subject to the behavior of the other buyers in order to maximize profit.

are similar to those of the classical monopsonist.[148] Unless the social welfare losses are offset by productive efficiencies, the mergers should be proscribed.[149]

As in the case of a horizontal merger of competing sellers, the critical issue is to determine the level of market power enjoyed by the newly merged firm. The most commonly employed indicator of market power is market share.[150] Here, the most difficult issue is to
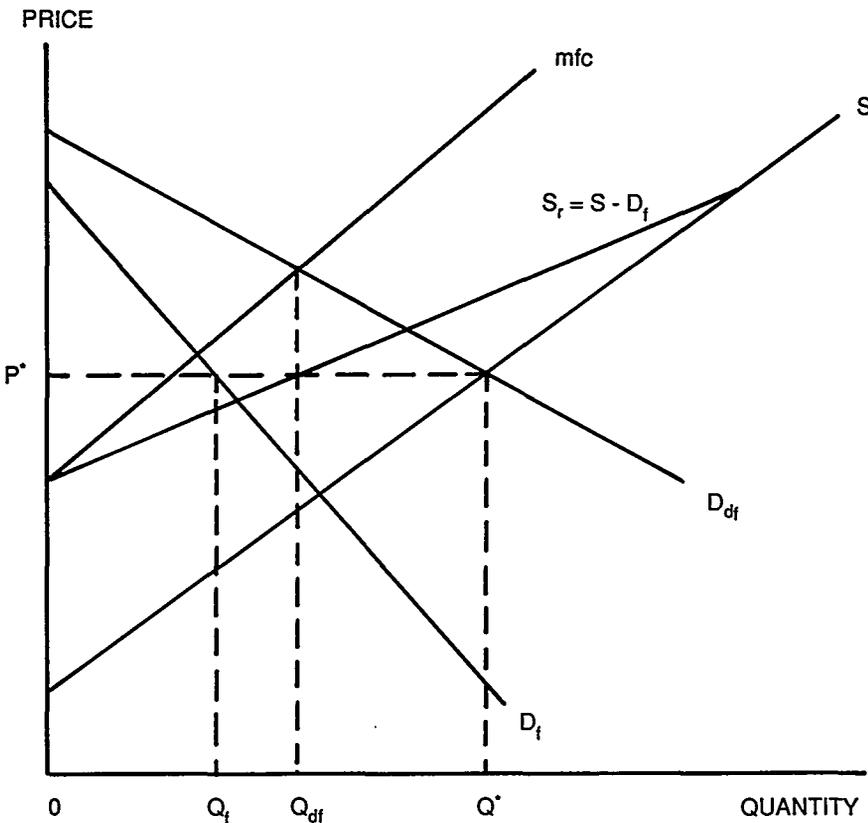
In the Figure, D_f represents the demand for the input in question by the competitive fringe, D_{df} represents the demand of the dominant firm, and S is the supply curve. The dominant firm recognizes that at any price the competitive fringe will purchase as any competitive firm would, *viz.*, where D_f equals the price. It incorporates this behavior by subtracting D_f from S to obtain the residual supply, which is denoted by S_r in the Figure. The curve represents the marginal costs of expanding the dominant buyer's purchases, *i.e.*, its marginal factor cost.

The balance of the analysis is familiar: the dominant buyer purchases Q_{df} where MFC equals D_{df}, which determines price equal to P* from the residual supply. At a price of P*, the fringe will purchase Q_f where P* equals D_f. At P*, sellers will provide Q*, which is equal to the sum of Q_f and Q_{df}. Since the dominant firm restricts its purchases below the quantity where demand (D_{df}) equals supply (S_r), there are welfare losses.

[148] *See supra* notes 32-72 and accompanying text.
[149] *See* Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18 (1968) (first proposal for efficiency defense).
[150] Market share is an unsatisfactory measure of market power. *See* Landes & Pos-

define the product market. All products that are "reasonably inter-changeable" to buyers should be included in the market.[151] The level of interchangeability will depend on how quickly buyers respond to price changes by altering their buying patterns. Thus, if buyers turn quickly to other sellers of the same product or sellers of different products as soon as one seller raises prices, the alternatives should be included in the product market. Technically, the propensity to change in response to price changes is measured by the elasticity of demand[152] or the cross-elasticity of demand.[153] The responsiveness of potential sellers to price increases as measured by supply elasticity limits market power.[154] Thus, even when a firm has a large market share, if a price increase encourages firms to enter the market, the market power of the firm is diminished.

These factors are reversed in the case of monopsony. First, the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes. The greater the number of good substitutes from the point of view of sellers, the lower the monopsony power of the merged firm. In a sense, the sellers may substitute away from low paying buyers in favor of higher paying buyers. This tendency is measured by their supply elasticity for the merged buyers. Also dampening the power of the monopsonist is the ability of new buyers to enter the market in response to artificially depressed price. Here, a high elasticity of demand will lessen monopsony power.

Although hardly an everyday occurrence, courts have considered cases involving merger-to-monopsony. In *United States v. Rice Growers Association of California*,[155] the Department of Justice challenged a merger of firms engaged in the purchase, milling, and re-

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ner, *supra* note 32. Some courts agree. *E.g.*, Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989) ("Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output.").

151 United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956) ("no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.").

152 Elasticity of demand measures the responsiveness of the quantity purchased to changes in price and is calculated as the percentage change in quantity divided by the percentage change in price.

153 Cross-elasticity of demand measures the responsiveness of the quantity sold of one good to changes in the price of a different good. It is calculated as the percentage change in the quantity of good X divided by the percentage change in the price of good Y. *See* R. BLAIR & L. KENNY, *supra* note 39, at 60-61, 65-66.

154 Supply elasticity measures the relative responsiveness of the quantity supplied to changes in price. It is calculated as the percentage change in quantity supplied divided by the percentage change in the price. *See* W. NICHOLSON, *supra* note 36, at 361.

155 1986-2 Trade Cas. (CCH) ¶ 67,288 (E.D. Cal., Jan. 31, 1986).

sale of rice on a number of grounds, including the possibility that it would "substantially . . . lessen competition in the market for the purchase or acquisition for milling of paddy rice grown in California."[156] The court held that the acquisition did indeed violate section 7 of the Clayton Act because of the decrease in competition among purchasers.[157]

In so holding, the court engaged in the appropriate market analysis. Specifically, it noted that California rice growers "perceive the California rice mills to be their best alternative for the sale of paddy rice."[158] In addition, it was not feasible for growers to shift to other crops. In effect, the court explored the possibility of substitute buyers and concluded that the rice growers' supply was relatively inelastic. The court found it unlikely that there would be entry of new buyers for the rice as its price was forced down, because shipment to other parts of the country or overseas was economically infeasible.[159]

A more recent merger case illustrates the problems that can arise in identifying the relevant market. In *United States v. Syufy Enterprises*,[160] the government challenged the acquisition practices of a movie theatre chain in the Las Vegas market under section 2 of the Sherman Act and section 7 of the Clayton Act. At trial, the government based its case on the possible anticompetitive effects of the acquisition in the market for the first-run exhibition of films, *i.e.*, the output market.[161] Apparently, the evidence regarding market definition tended to show that there were good substitutes in the eyes of consumers for first-run films and that good substitutes might appear in the market if prices rose. Hence, in a post-trial brief the government made a merger-to-monopsony argument based on *Rice Growers*, and cited the impact on film distributors as the harm to be avoided.[162]

The court dismissed the argument as an effort by the government to reduce the relevance of the demand elasticity of consumers.[163] The court noted that the government could not begin with one theory of impact and then, when the market definition began to favor the defendants, change to a theory that had not been presented at trial.[164] Clearly, the government discovered the

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156   *Id.* at 61,466.
157   *Id.*
158   *Id.* at 61,462.
159   *Id.* at 61,464.
160   712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990).
161   *Id.* at 1398.
162   *Id.*
163   *Id.* at 1397-98.
164   *Id.* at 1397-99.

merger-to-monopsony theory too late. If Syufy's acquisitions harmed anyone, it was the distributors of films. Consequently, the government should have focused on the availability of alternative outlets to the sellers from the outset of the litigation.

B. Vertical Mergers

Since 1971, the motives for vertical integration have received a great deal of attention.[165] Most of the attention has focused on the incentives for an intermediate good monopolist to integrate toward the downstream stage.[166] ·Less attention has been paid to the theory of upstream vertical integration by a monopsonist.[167] There is, however, a strong incentive for a monopsonist to integrate upstream and acquire its input suppliers.

In Figure 4, the monopsonist's derived demand curve for an input is shown as the downward-sloping marginal revenue product curve (MRP).[168] AC represents the industry average cost of producing the input. The industry's marginal cost curve, which corresponds to the industry supply curve, is MC. The industry supply curve shows the *average* purchase price to the monopsonist for any particular quantity. In contrast, the marginal factor cost (MFC) represents the *marginal* cost to the monopsonist of increasing the employment of this input. The MFC lies above the supply curve because increases in the employment of this input require paying increased prices. Since the higher price must be paid for all units of the input, the marginal impact upon total expenditures (MFC) exceeds the price, which is the average impact.[169] In the absence of vertical integration, the monopsonist will employ Q_1 units of input

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165   Interestingly, the burst of attention was spawned by a two-page note which rediscovered an earlier result. *See* M.L. Burstein, *A Theory of Full-Line Forcing*, 55 Nw. U.L. REV. 62 (1960); John Vernon & Daniel Graham, *Profitability of Monopolization by Vertical Integration*, 79 J. POL. ECON. 924 (1971).

166   A good deal of this literature has been surveyed. *See* R. BLAIR & D. KASERMAN, *supra* note 12, at 283-320; David L. Kaserman, *Theories of Vertical Integration: Implications for Antitrust Policy*, 23 ANTITRUST BULL. 483 (1978).

167   *See* Martin K. Perry, *Vertical Integration: The Monopsony Case*, 68 AM. ECON. REV. 561 (1978). There are other treatments that are not as thorough but are still useful. *See* ROGER D. BLAIR & DAVID L. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 114-20 (1983); John S. McGee & Lowell R. Bassett, *Vertical Integration Revisited*, 19 J.L. & ECON. 17 (1976); S.Y. Wu, *The Effects of Vertical Integration on Price and Output*, 2 W. ECON. J. 117 (1964).

168   The marginal revenue product of an input is the product of marginal revenue and marginal product. When a firm employs an additional unit of an input, the amount by which total output rises equals the input's marginal product. The value of the added output is given by the marginal revenue. Thus, marginal revenue times marginal product represents the marginal value to the employer of having additional inputs, which is why the MRP curve is the demand for the input. *See, e.g.*, R. BLAIR & L. KENNY, *supra* note 39, at 342-43.

169   Since the total cost of employing X is $P_X \times Q_X$ where P_X is an increasing function

as determined by the intersection of MRP and MFC at point B. At this level of employment, the area ABQ_10 represents the monopsonist's total revenue. Total cost is equal to price times quantity P_1Q_1, which equals the area P_1CQ_10. Consequently, the nonintegrated monopsonist's maximum profits equal the area $ABCP_1$.

FIGURE 4
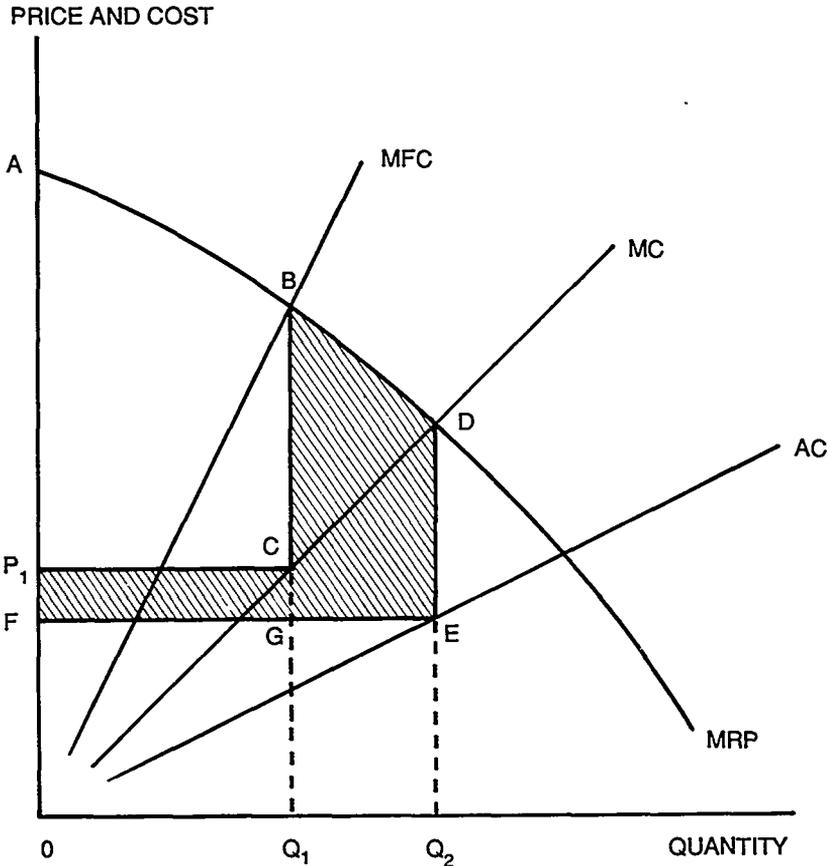
With complete vertical integration, the profit-maximizing employment of the input increases to Q_2 as determined by the intersection of MRP and MC at point D.[170] Here, total revenue is area ADQ_20, and total cost is area FEQ_20. Thus, the fully integrated

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of X, the marginal effect of expanding employment is the marginal factor cost: $\partial(P_X \times Q_X)/\partial Q_X = P + Q_X(\partial P_X/\partial Q_X) > P_X$ since $\partial(P_X \times Q_X)/\partial Q_X > 0$ by hypothesis.

[170] Following the vertical integration, the firm will look at the marginal cost of *producing* the input rather than the marginal cost of *buying* the input in reaching its employment decisions.

firm's maximum profits are equal to the area ADEF. The shaded area P_1CBDEF represents the gross increase in profits that results from vertical integration by the monopsonist. This profit increase provides the incentive for vertical integration. Whether this is accomplished through merger or internal expansion depends upon the relative costs of the two avenues.

The increased profits resulting from vertical integration flow from two sources. The first source is that portion of the upstream industry's pre-integration rents that are captured by the monopsonist.[171] Area P_1CGF represents this "rent effect." The second source of increased profits arises from eliminating the efficiency loss due to under-employing the monopsonized input in the absence of vertical integration. This is the "efficiency effect," and it is shown as area GBDE in the graph.[172] The relative sizes of these two effects depend upon the slope of the MRP curve. As MRP flattens, the "efficiency effect" grows and the "rent effect" decreases. This increase in profits represents the gross benefits to the monopsonist of acquiring productive capacity at the upstream stage. As long as the costs of acquisition are smaller than these gross benefits, the acquisition will occur.[173]

The welfare effects of the monopsonist's backward vertical integration are unambiguously positive. As the monopsonist vertically integrates, the employment of the monopsonized input increases. This results in greater output of the final good at a lower price. If the monopsonist is a perfect competitor in the output market, the price reduction will be very slight.[174] But if the monopsonist has some market power in the final good market, the price reduction may be quite substantial.[175] In either event, consumers are not hurt by the vertical integration. In the example discussed above, the acquiring firm was a pure monopsonist. The same effects also follow in the case of purchasers with a lower level of monopsony power.

Market foreclosure is the main objection to vertical mergers.[176]

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[171]   *See* Perry, *supra* note 167, at 568-69 (labelling this the "rent effect").

[172]   *See* R. BLAIR & D. KASERMAN, *supra* note 167, at 118.

[173]   *Id.* at 118-20.

[174]   When a firm is a perfect competitor in the output market, it is very small relative to the industry as a whole. Thus, any output change by a single firm cannot have much impact on price. *See* R. BLAIR & D. KASERMAN, *supra* note 12, at 3-4.

[175]   When a firm has market power, its output decisions have a measurable impact upon price. *See* sources cited *supra* note 32.

[176]   The most recent Supreme Court decision on vertical integration is Ford Motor Co. v. United States, 405 U.S. 562 (1972), which involved Ford's acquisition of Electric Autolite, a sparkplug manufacturer. The trial court objected to the acquisition because of "the foreclosure of Ford as a purchaser of about ten per cent of total industry output." *Id.* at 568 (quoting United States v. Ford Motor Co., 315 F. Supp. 372, 375 (E.D. Mich. 1971)).

In the case of pure monopsony, however, there is no actual foreclosure. Since the monopsonist bought all of the upstream industry's pre-integration output, the merger forecloses no rival purchaser from this source of supply. Similarly, since the monopsonist will buy all of the input suppliers, there will be no independent suppliers and thus no foreclosure from selling to the monopsonist.

A stronger possibility of foreclosure arises when the acquiring firm is not a pure monopsonist. It is then possible that other purchasers will be unable to obtain the input. In addition, the independent suppliers will have one less outlet. As one commentator has shown, this possibility may not be a real concern.[177] If the acquiring firm obtains its output from the acquired firm, the output of the other suppliers would still be available to the competing purchasers. In the extreme, the acquiring firm may acquire all the producers of the input and become a monopolist in the input market. Here, however, the horizontal concerns about monopolists would apply.

Potential foreclosure is a variation on the foreclosure issue.[178] If another buyer enters that industry, it will have no source of supply. This may constitute a barrier to entry because it requires a new entrant to be vertically integrated. But entry occurs in response to excess profits. If there are excess profits, that a new entrant must enter at both levels can only delay entry—it cannot prevent it.[179] This delay, however, is valuable to the established firm because it extends the period during which the firm earns excess profits. In sum, an accurate determination of the competitive effect of a monopsonist's upstream vertical integration requires the decisionmaker to weigh the certain and immediate gain in consumer welfare against the problem of potential foreclosure.[180]

V

MONOPSONY AND PRICE DISCRIMINATION

The Robinson-Patman Act of 1936, which amended section 2 of

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[177]   ROBERT H. BORK, THE ANTITRUST PARADOX 231-38 (1978).

[178]   For a brief examination, see RICHARD A. POSNER, ANTITRUST LAW 196-201 (1976), and R. BLAIR & D. KASERMAN, *supra* note 12, at 314-16.

[179]   Under "real world" conditions, entry is not free, *i.e.*, it involves some transaction costs. Thus, entry can only occur if the transaction costs associated with entry do not exceed the gains to be had by entry.

[180]   Another possible concern about vertical integration involves so-called price squeezes. These usually involve a manufacturer of an intermediate good that fabricates some of its output and sells the rest to nonintegrated fabricators. A price squeeze occurs when the manufacturer raises the price of the intermediate good but holds down the price on the fabricated good. *See, e.g.*, Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986). This concern does not apply to our case.

the Clayton Act, forbids price discrimination when it is apt to have an anticompetitive effect.[181] Most of the Robinson-Patman Act does not address the behavior of buyers. The powerful buyer, however, is not totally ignored as section 2(f) provides that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."[182] In principle, this seems to impose liability on large buyers that extract discriminatory price concessions from a seller.[183] The most likely sources of monopsonistic price discrimination arise in connection with unexploited economies of scale[184] and unexploited differences in supply elasticities.

A. Monopsony and Unexploited Scale Economies

In industries with unexploited scale economies, firms possess excess capacity. The presence of excess capacity means that some firms could exit without increasing the costs of production. When suppliers have excess capacity, large buyers may recognize that they have some buying power with which to extract more favorable terms of exchange.

In Figure 5, the seller is able to produce and sell Q_1 units of output and incurs average costs per unit equal to AC_1. Excess capacity is signalled by the downward slope of the producer's average cost curve (AC), which is decreasing at output Q_1. Suppose a large buyer accounts for $Q_1 - Q_2$ units of the total output sold. If that buyer withdraws its business and obtains its supplies of this product elsewhere, there will be two effects on the seller. First, it will lose whatever profit it had been earning on that buyer's purchases. Second, and somewhat less obviously, the seller will lose some of the profit that it had been earning on sales to its other customers. The seller's quantity will fall to Q_2 and the average cost per unit will rise to AC_2. As a consequence, the *total* cost of serving the remaining customers will rise by the striped area, which is equal to $(AC_2 - AC_1)Q_2$.

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181   Section 2(a) prohibits price discrimination where its effect "may be substantially to lessen competition." 15 U.S.C. § 13(a) (1988).

182   *Id.* § 13(f).

183   Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979); Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953); American Motors Specialities Co. v. FTC, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

184   Economies of scale exist when the firm is producing on the negatively sloped portion of its average cost curve. Expansions in output will result in reductions in per unit costs. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 81-118 (1980) (extensive examination of this concept and its implications for market structure).

FIGURE 5

COST

AC$_2$

AC$_1$

AVERAGE COST

0   Q$_2$ Q$_1$ QUANTITY
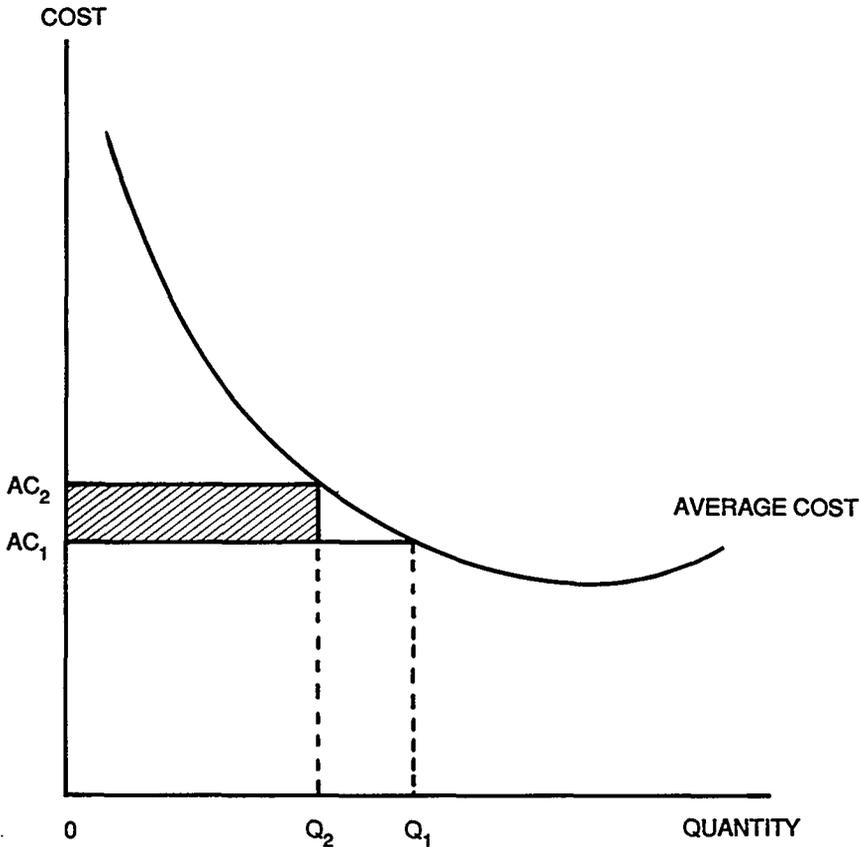
A sophisticated large buyer may engage in strategic behavior to extract some added benefits from a seller with excess capacity. For example, the buyer could threaten to withdraw its business unless the seller agrees to a price equal to AC$_1$ for the buyer's purchase.[185] The seller would earn no profits on the sales to the large buyer (Q$_1$— Q$_2$), but would preserve all of the profit on its sales to its other customers (Q$_1$). In the extreme, the large buyer could require that the seller actually agree to a price below cost for the buyer's purchases to the extent that losses that would be incurred on sales to the large buyer equal the profits that would be lost on sales to other buyers if the large buyer withdrew its business (striped area in

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[185] Although price discrimination is illegal if it has or is likely to have an anticompetitive effect, a price concession made in good faith to meet competition is legal irrespective of the competitive consequences. 15 U.S.C. § 13(b) (1988) ("nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor"). The Supreme Court has interpreted this defense as absolute. *See* Standard Oil Co. v. FTC, 340 U.S. 231, 240-51 (1951).

Figure 5). At that point, the seller would be indifferent between los-
ing the large buyer's account and retaining it since total profits
would be the same in both cases.

This business behavior appears abusive, but it actually tends to
bring the market to a state of equilibrium. It is economically desira-
ble that some sellers suffer losses and have to leave the industry.
Society has invested too many resources in the production of the
input. Therefore, it is socially desirable that some capacity exit the
industry. Although the large buyer's behavior may appear unsa-
vory, it increases social welfare in the long run. The antitrust laws,
as section 2(f) of the Robinson-Patman Act suggests, do not appear
to take this view.

In practice, the large buyer may escape liability through the de-
rivative nature of the defenses the Act provides to price discriminat-
ing sellers. In particular, the buyer with monopsony power may
solicit bids from multiple sellers with excess capacity. So long as
each seller does no more than make a good faith effort to meet the
prices of competing sellers, it will have a valid "meeting competi-
tion" defense for its discriminatory offer. Because the seller would
not have engaged in unlawful price discrimination, the buyer, like-
wise, would not have violated section 2(f).[186] Most large buyers
would, therefore, escape liability for exploiting scale economies.

B. Different Supply Elasticities

The discriminating monopsonist exploits differences in supply
elasticities among inputs to pay different prices for those inputs of
identical quality.[187] In Figure 6, S_1 and S_2 represent alternative
sources of supply of a specific input. We assume that the quality of
the input is uniform across both sources of supply.[188] The monop-
sonist will purchase a mix of output from the two supply sources
where both marginal factor costs are equal to the marginal revenue
product:[189]

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[186] *See Automatic Canteen*, 346 U.S. at 74 ("We therefore conclude that a buyer is not
liable under § 2(f) if the lower prices he induces are . . . within one of the seller's
defenses . . . ."); *see also Great Atl. & Pac. Tea Co.*, 440 U.S. 69 (holding buyer not liable if
seller had a meeting competition defense).

[187] Similarly, the discriminating monopolist exploits differences in *demand* elasticities
to charge different prices. *See* R. BLAIR & L. KENNY, *supra* note 39, at 268-73.

[188] If the quality varies across sources of supply, the analysis is more complicated,
but the same general principles apply. *See* LOUIS PHLIPS, THE ECONOMICS OF PRICE DIS-
CRIMINATION 203-51 (1983).

[189] This condition can be derived quite simply. If production requires corn (C),
which may come from Kansas (C_1) or from Iowa (C_2), and capital (K), which we assume
to be fixed, then profit is given by

$$\Pi = P \times Q(C, K) - p_1 C_1 - p_2 C_2 - rK$$

where P is output price, Q (C, K) is the production function, and p_1, p_2, and r are the

$$MRP = MFC_1 = MFC_2.$$

lf this condition is not met, the monopsonist will change the mix. For example, if MFC_1 exceeds MFC_2, then the monopsonist will reduce purchases from source 1, thereby decreasing MFC_1, and replace those inputs with purchases from source 2, thereby increasing MFC_2. Such a rearrangement will reduce total expenditures and, therefore, increase profits. Consequently, such shifts will continue until the marginal factor costs are equal across all sources of supply.

FIGURE 6

PRICE AND COST
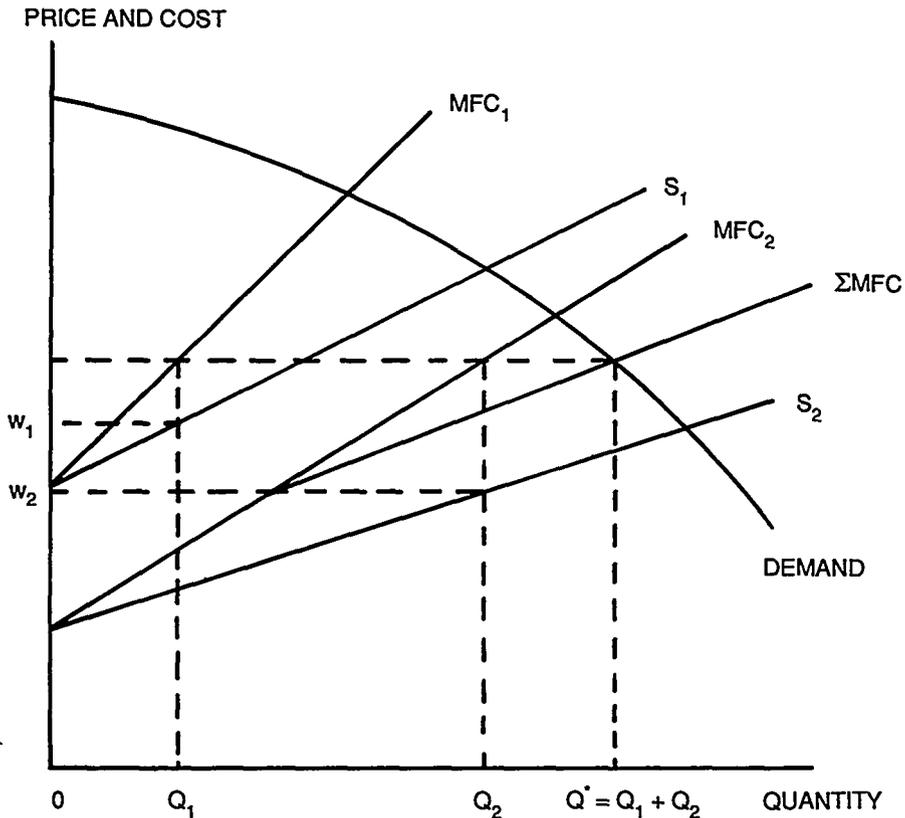
prices of Kansas corn, Iowa corn, and capital, respectively. Profit maximization requires that

$$\frac{\partial \Pi}{\partial C_1} = MR \times MP_c \frac{\partial C}{\partial C_1} - MFC_1 = 0$$

and

$$\frac{\partial \Pi}{\partial C_2} = MR \times MP_c \frac{\partial C}{\partial C_2} - MFC_2 = 0$$

Since $\partial C/\partial C_1 = \partial C/\partial C_2 = I$, these conditions can be written as

$$MRP = MFC_1$$

and

$$MRP = MFC_2$$

Combining these equations provides the expression in the text.

In Figure 6, the horizontal summation of MFC_1 and MFC_2 is shown as MFC. The monopsonist will buy a total quantity of Q^*. These purchases will be split between sources 1 and 2 such that MFC_1 equals MFC_2, resulting in Q_1 being purchased from source 1 and Q_2 being purchased from source 2. Because of the differences in supply elasticities, the price paid to source 1 suppliers (w_1) exceeds the price paid to source 2 suppliers (w_2). Because the quality of the inputs (and, therefore, their productivity) is identical across sources of supply, we say that the price difference is discriminatory.[190]

Two consequences flow from monopsonistic price discrimination that exploits differing supply elasticities. First, because the single price that would be paid by a nondiscriminating monopsonist lies between w_1 and w_2, this price discrimination expands purchases from source 1 and contracts them from source 2.[191] Second, some producer surplus is converted to consumer surplus, which motivates the monopsonist to discriminate in price.[192] Notwithstanding these consequences, the practice does not affect the monopsonist's total purchases; therefore, the total output produced by the monopsonist remains unchanged.[193] Consequently, there is no impact upon the monopsonist's customers.

The Robinson-Patman Act's prohibitions do not appear to extend to the discriminating monopsonist. The language of the Robinson-Patman Act directs its prohibitions to the behavior of big sellers—not big buyers. Perhaps "favoring" one supplier over another could be viewed as an abuse of monopsony power, but we are unaware of any cases that so hold.

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[190]   In this context, the term "discriminatory" does not have the pejorative connotation associated with our intuitive understanding of bias or prejudice. Instead, it simply means that different prices are being paid for inputs of identical quality. *See* J. ROBINSON, *supra* note 41, at 224-26.

[191]   If the buyer does not discriminate, it will select the quantity where the MFC intersects demand. The resulting price will be between w_1 and w_2. A price above w_2 will induce the source 2 supply to expand while a price below w_1 will cause the source 1 supply to shrink.

[192]   It can be shown that social welfare decreases on balance because output does not expand. Such a proof depends upon a very sophisticated analysis that is related to the welfare consequences of price discrimination by sellers. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 137-40 (1988). The economic intuition is that the distribution of purchases across rival sellers is not socially efficient.

[193]   A nondiscriminating monopsonist will purchase where the marginal factor cost associated with the horizontal summation of the two supply curves (S_1 and S_2) intersects demand. This marginal factor cost is precisely the Σ MFC in Figure 6. Thus, there will be no change in the quantity of either input or output.

VI
MONOPSONY, ANTITRUST INJURY, AND ANTITRUST STANDING

A. Background

As the preceding three Parts suggest, there are a variety of contexts in which monopsony can cause the types of harm the antitrust laws are designed to prevent. Substantive economic analysis reveals that it is an error to infer that the lower prices a monopsonist obtains translate into lower ultimate prices for the monopsonist's customers.[194] Full incorporation of monopsony theory into antitrust policy, however, must address the issues of antitrust injury and antitrust standing.[195] Technically, antitrust *injury* defines the range of harms that are compensable under the antitrust laws.[196] Antitrust *standing* limits the array of potential plaintiffs.[197] Although the issues are conceptually distinct, antitrust injury is merely a subset of antitrust standing.[198] In other words, having suffered the right type of injury is necessary but not sufficient to establish antitrust standing.

1. *Antitrust Injury*

In the leading antitrust injury case, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[199] Pueblo, an independent operator of bowling centers, alleged that Brunswick's acquisition of several bowling centers violated section 7 of the Clayton Act.[200] Not only were the acquired centers competitors of Pueblo, they were on the verge of insolvency. Pueblo contended that.the profit it would have earned had the competing centers left the market constituted antitrust injury.[201]

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194   *See supra* text accompanying notes 42-52.
195   *See* sources cited *supra* note 18; *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 334.1-342.2 (Supp. 1989) (supplement to P. AREEDA & D. TURNER, *supra* note 10); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985); Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 MINN. L. REV. 1011 (1983); Note, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309 (1984) (authored by Daniel C. Richman); Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damage Actions*, 72 CALIF. L. REV. 437 (1984) (authored by Clare Deffense).
196   *See* R. BLAIR & D. KASERMAN, *supra* note 12, at 73-74; Blair & Harrison, *supra* note 18.
197   *See* Blair & Harrison, *supra* note 18, at 1543-52.
198   *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 539-40 (1983).
199   429 U.S. 477 (1977).
200   *See supra* note 140 (giving relevant portion of § 7 of Clayton Act).
201   *Brunswick*, 429 U.S. at 481.

The Supreme Court disagreed.[202] The plaintiff argued that, but for the acquisition, it would have been the sole seller in the market, and presumably would have been able to raise prices. The Court focused not on whether there was upward or downward pressure on prices, but on whether the injury flowed from an activity the antitrust laws were "intended to prevent."[203] Because the antitrust laws were not intended to prevent market movement away from concentration, Pueblo suffered no antitrust injury.

2. *Antitrust Standing*

The leading antitrust standing case is *Associated General Contractors, Inc. v. California State Council of Carpenters.*[204] The case arose from a claim by a union that a multiemployer builders' association had violated section 1 of the Sherman Act by coercing members, nonmember landowners, and subcontractors to hire nonunion labor.[205] The Supreme Court considered a series of factors in determining that the union did not have standing.[206] First, the Court included an antitrust injury requirement in its approach to antitrust standing and opined that the union had not linked its injury to the goal of increasing competition.[207] Second, the Court considered not only whether the "right" type of injury had occurred, but also the directness of the alleged injury with respect to the plaintiff.[208] The presence of a more direct victim lessened the possibility that the violation would go unchallenged if this particular plaintiff were found not to have standing, and therefore weakened the argument for standing. Finally, the *AGC* Court drew support from its 1977 decision in *Illinois Brick Co. v. Illinois*,[209] which provides that, in most cases, only those purchasing directly from a defendant can recover under the antitrust laws. The *Illinois Brick* Court reasoned that limiting standing in antitrust actions for damages to direct purchasers would avoid the twin evils of multiple liability and the complexity of apportioning a set amount of damages among groups of plaintiffs. Those interests also weighed against holding that the union in *AGC* had antitrust standing.[210]

Against this backdrop, we consider the potential plaintiffs in the

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202   *Id.* at 486-89.
203   *Id.* at 489.
204   459 U.S. 519 (1983). We refer to this case in both text and footnotes as the *AGC* case.
205   *Id.* at 522.
206   *Id.* at 521.
207   *Id.* at 538; *see also* P. AREEDA & H. HOVENKAMP, *supra* note 195, ¶ 334.1 (finding a nexus between standing and antitrust injury).
208   459 U.S. at 535, 540-43.
209   431 U.S. 720 (1977).
210   *Id.* at 740-41.

case of a collusive monopsony with fixed prices.[211] The two obvious groups of plaintiffs are sellers who have received lower prices because of monopsonistic pressure, and consumers who have paid higher prices because of the monopsony's reduction in output.

B.   Sellers to a Collusive Monopsony

It is tempting to conclude that sellers have suffered no antitrust injury if their complaint is that they were unable to *raise* prices, because the antitrust laws are not designed to enable a seller to raise prices.[212] This conclusion misinterprets *Brunswick*. The Court found no antitrust injury, not because the plaintiff preferred an interpretation of the antitrust laws that would permit it to raise prices, but because the activity of which the plaintiff complained had increased rather than decreased competition.[213] Quite the opposite is true of sellers to a collusive monopsony. The harm suffered flows directly from collusive activity that decreases competition among buyers. Moreover, this injury is typically associated with decreases in output and increases in consumer prices.

Sellers to a collusive monopsony also meet the requirements of antitrust standing. The harm to sellers could hardly be more direct. They walk in the same shoes as the buyers from a price-fixing cartel.[214] Moreover, a finding that sellers to a collusive monopsony have antitrust standing does not create a risk of multiple liability.[215]

C.   Customers of a Collusive Monopsony

Analysis of antitrust injury and standing for customers of a collusive monopsony is less clear, and requires the suspension of one's economic intuition. These buyers pay more even though their suppliers have employed monopsony power to obtain lower prices for

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[211]   The analysis with respect to victims of other forms of monopsony conduct would be similar to that which follows.

[212]   In Jack Walters & Sons v. Morton Building, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984), which was not a monopsony case, Judge Posner found that the plaintiff's inability to raise price did not constitute antitrust injury. *Id.* at 708-09; *cf.* P. AREEDA & H. HOVENKAMP, *supra* note 195, ¶ 337.2f (direct seller to a collusive monopsony will make a claim for the monopsony "undercharge").

[213]   *Brunswick*, 429 U.S. at 489.

[214]   Just as indirect buyers lacked standing in *Illinois Brick*, indirect sellers would also lack standing. For example, suppose the major retail grocery chains collude and drive down the price that they pay to meat packers for beef. The meat packers would be direct sellers and would have standing to sue for the antitrust injury that they suffered. The behavior of the buying cartel would also have deleterious effects on the demand for cattle which would depress the price paid to cattle ranchers. The ranchers, however, would be indirect sellers and lack standing despite their antitrust injury. *See, e.g.*, Zinser v. Continental Grain Co., 660 F.2d 754 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982).

[215]   *See infra* text accompanying notes 217-19.

their inputs.[216] More accurately, these buyers pay more *because their suppliers have paid less for the input*. Although the economic analysis seems thoroughly counterintuitive, the harm suffered by these consumers flows from the unlawful collusion. Thus, the customers have also suffered antitrust injury.

It is more difficult to determine whether the customers have antitrust standing. Although they purchase from offending firms, they are not the parties at which the prohibited activity is directed. On the issue of direct harm, they fall conceptually somewhere between the indirect purchasers of *Illinois Brick* and the sellers to a collusive monopsony, thereby making any conclusion premature.

For both sellers to, and customers of, a collusive monopsony, multiple liability constitutes no stumbling block on the way to standing. In *Illinois Brick*, the Court assumed that a price-fixing conspiracy would cause harm by an amount equal to the overcharge resulting from the conspiracy.[217] That amount was in essence a "pie" from which each successive purchaser all the way down the chain of distribution to the final consumer would take a "slice."[218] Under the reasoning of the Court, anything other than apportionment of this fixed amount created a risk of multiple liability.[219] Because such apportionment would be highly complex, the Court denied standing.[220] The case of a price-fixing collusive monopsony is not analogous to the *Illinois Brick* defendants. The damage to the most direct victims—the sellers—is distinct from the losses to the purchasers. The sellers suffer a loss in revenue due to the decreased price. Purchasers suffer from higher prices caused by restrictions in output. Thus, there is no apportionment or multiple liability problem in the case of damages due to collusive monopsony except in the case of indirect purchasers.

The damage calculation itself, however, would be difficult. One would be required to determine what the price of the final output would have been had the colluding firms paid *more* for the input.[221] Although we believe that the balance tips in favor of antitrust standing for buyers from a collusive monopsony, the case for such a position is not beyond question.

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216   *See supra* text accompanying notes 42-52.
217   *Illinois Brick*, 431 U.S. at 727.
218   *Id.* at 740-41.
219   *Id.*
220   *Id.* at 736-38.
221   Traditionally, courts have been lenient about the degree of certainty required to prove the *amount* of damages in an antitrust case. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-66, *reh'g denied*, 327 U.S. 817 (1946); *see also* Jeffrey L. Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 751, 756-58 (1980) (discussing the Court's relaxation of proof requirements for the quantum of antitrust damages).

VII
SUMMARY

Antitrust policymakers and, to some extent, antitrust scholars have never fully incorporated the symmetry of markets into their analyses. They have focused almost exclusively on the behavior of sellers. Yet the simple truth is that there is a buyer for every seller, and anticompetitive conduct by buyers can cause adverse economic consequences similar to those caused by anticompetitive conduct by sellers. This omission from antitrust analysis posed less of a threat when antitrust policy was governed by a few clear and well-worn per se rules; notably, that price fixing, whether by buyers[222] or sellers,[223] was per se unlawful.

Since the emphasis has shifted from legal rules to economic analysis, courts and commentators must develop and explore the economic foundations for dealing with anticompetitive conduct by buyers. The need is pressing because the most obvious result of concentrations of power on the buying side of a market is a decrease in price. This tempts a court to erroneously stop its substantive analysis at that stage, or declare that the plaintiffs have not suffered antitrust injury.

We have examined several areas in which courts have examined conduct by buyers. With respect to single firm and collusive abuses of monopsony power, we conclude that the results of the bright-line tests of the past make economic sense. We have made an effort, however, to provide new economic underpinnings for those outcomes. In the area of collusive monopsony, the danger that a misunderstanding of the economics of monopsony will lead to incorrect results reaches its apex. We emphasize three main points. First, lower input prices resulting from the exercise of monopsony power do *not* ultimately translate into lower prices to the monopsonist's customers and increased overall consumer welfare. Thus, neither the substantive nor the procedural analysis should stop with the initial impact on input price. Second, the monopsony model typically employed in many economic texts and antitrust casebooks seriously understates the variety of consequences of the exertion of monopsony power. Finally, the long-run consequences of monopsony must not be ignored. Lower input prices in the short run may mean decreases in both future supply and in ultimate, overall consumer well-being.

We have also briefly considered merger policy and price dis-

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[222] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
[223] *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

crimination. With respect to vertical mergers by monopsonists in which a supplier is acquired, the new antitrust wisdom that vertical mergers are rarely harmful generally holds true. In the context of horizontal mergers or "mergers-to-monopsony," however, the issues are more complex. This complexity arises because the starting point for merger analysis is the determination of market share. For mergers of competing buyers, the usual analysis must be reversed, and the "reasonable interchangeability" test for market definition must be applied from the point of view of sellers.

In addressing price discrimination, we demonstrated that under certain conditions a buyer with monopsony power may be able to "coerce" a seller into discriminatory pricing. Economic analysis suggests that any ultimate economic harm from such a practice is unlikely. Subject to some important defenses, however, such a use of monopsony power may violate section 2(f) of the Clayton Act.

Finally, we analyzed the issues of antitrust injury and antitrust standing in the context of monopsony conduct. The potential plaintiffs in the simplest case—that of a price fixing collusive monopsony—include both sellers to, and buyers from, the colluding firms. We concluded that both of these groups have suffered antitrust injury. In addition, we are confident that the sellers to the collusive monopsony have antitrust standing as well. Although we believe that buyers from the colluding firms *should* have antitrust standing, we are less confident that existing antitrust standing case law permits this outcome.