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# A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice

Robert H. Lande
*University of Baltimore School of Law*

# A TRADITIONAL AND TEXTUALIST ANALYSIS OF THE GOALS OF ANTITRUST: EFFICIENCY, PREVENTING THEFT FROM CONSUMERS, AND CONSUMER CHOICE

*Robert H. Lande**

*This Article ascertains the overall purpose of the antitrust statutes in two very different ways. First, it performs a traditional analysis of the legislative history of the antitrust laws by analyzing relevant legislative debates and committee reports. Second, it undertakes a textualist or "plain meaning" analysis of the purpose of the antitrust statutes, using Justice Scalia's methodology. It does this by analyzing the meaning of key terms as they were used in contemporary dictionaries, legal treatises, common law cases, and the earliest U.S. antitrust cases, and it does this in light of the history of the relevant times.*

*Both approaches demonstrate that the overriding purpose of the antitrust statutes is to prevent firms from stealing from consumers by charging them supracompetitive prices. When firms use their market power to raise prices to supracompetitive levels, purchasers pay more for their goods and services, and these overcharges constitute a taking of purchasers' property. Economic efficiency was only a secondary concern. In addition, the textualist approach leads to the surprising conclusion that neither the Sherman Act nor the Clayton Act contain an exception for monopolies attained by efficient business conduct. A "plain meaning" analysis of the antitrust statutes reveals that they are supposed to prevent and condemn all privately created monopolies.*

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* Venable Professor of Law, University of Baltimore School of Law, and a Director of the American Antitrust Institute. The author thanks Neil Averitt, Garrett Epps, Alan Fisher, Albert Foer, John B. Kirkwood, C.J. Peters, Colin Starger, and Charles Tiefer for extremely helpful suggestions, and Jennifer Burroughs, Virginia Callahan, and Robert Pool for excellent research assistance.

## INTRODUCTION

This Article determines the overall purpose of the antitrust statutes in two very different ways. First, it performs a traditional analysis of the legislative history of the antitrust laws by analyzing relevant legislative debates and committee reports. Second, it undertakes a textualist or "plain meaning" determination of the purpose of the antitrust statutes, using Justice Scalia's methodology. It does this by analyzing the meaning of key terms as they were used in contemporary dictionaries, legal treatises, common law cases, and the earliest U.S. antitrust cases, and it does this in light of the history of the times.

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The importance of this distinction can be illustrated by an extraordinary document that recently turned up: the inaugural speech by the first candid efficiency purist to head either the Antitrust Division or the Federal Trade Commission (FTC)![1] It says the following:

> Today I'm announcing three important changes in enforcement priorities: First, I'm going to permit most mergers to monopoly even if postmerger prices are likely to rise dramatically, so long as the merger is likely to lead to even a tiny cost savings. For example, even a 10 percent price rise usually will be fine so long as costs fall by 1/4 of 1 percent.[2]
>
> Second, I'm going to permit many cartels, even when firms fix prices or rig bids.[3] I'll be especially unlikely to prosecute cartels involving necessities, because demand tends to be highly inelastic and therefore unlikely to cause allocative inefficiency.[4] For example, an insulin cartel

1. This is a hypothetical whose purpose is to illustrate some of the effects of an antitrust policy that is both candid and solely based upon the goal of maximizing economic efficiency.

2. *See* Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 387 tbl.1, 420 (1980). For the origin of this approach to merger analysis, see generally Oliver E. Williamson, *Economies As an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); *see also* Alan A. Fisher, Frederick I. Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 809–13 (1989), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134826.

3. For explanations of bid-rigging scenarios that do not produce allocative inefficiencies and additional examples, see Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 497–503 (2012).

4. Because a monopolist produces less than would be produced under competitive conditions, unless demand is completely inelastic, some resources that would otherwise have been used to make the monopoly product will instead be used for other purposes—ones that consumers value demonstrably less. This misallocation of resources results in diminished satisfaction of society's wants and, thus, in terms of what society values, a reduction of society's total wealth. This effect is termed "allocative inefficiency" or the deadweight welfare loss. Elimination of monopoly pricing would, *ceteris paribus*, increase society's total wealth and, therefore, increase consumer satisfaction. For a formal proof that

that raises prices by 300 percent would be fine because demand is probably inelastic within the relevant range.[5] The more essential something is to a large percentage of consumers, the more likely it is a product for which everyone is welcome to fix prices.[6]

Finally, I'm going to permit every news related merger and joint venture. It wouldn't bother me if every hard copy and online source of news merged and there was only one source of news left in the United States. The inefficiency effects of any resulting market power would be extremely difficult to demonstrate because news organizations compete with so much else for advertising and personnel. Yet, these transactions would result in a tremendous cost savings due to the elimination of duplicative newsgathering operations, so they would be net efficient.[7]

I'm announcing these policy changes because they follow from the approach to antitrust I think best: the efficiency-only approach. The efficiency approach leads to these policies due to the relatively small size of the allocative inefficiency effects of monopoly power,[8] the fact that inefficiency effects of market power are extraordinarily difficult to prove accurately or convincingly in a litigation setting,[9] and the likely existence of efficiencies from most practices that are large enough to offset the resulting inefficiencies.[10]

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monopoly pricing causes allocative inefficiency, see EDWIN MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 208–31 (5th ed. 1982).

5. Hypothetical adapted from Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 340 n.14 (2010).

6. Many pharmaceuticals would qualify, as would house keys, perhaps even gasoline in some circumstances; the list goes on and on.

7. If every news company merged in the long run, this could result in *x*-inefficiency. I would of course give a higher priority to relatively certain cost savings and would discount future *x*-inefficiency effects because of their speculative nature and the time value of money.

8. The allocative inefficiency effects of market power are remarkably small. The standard monopoly power diagram, see *infra* Part I.B.5, shows the allocative inefficiency effects of market power as being relatively large—one half as large as the transfer effects. This ratio, however, is only theoretical and is based upon some very unlikely assumptions. *See infra* Part I.B.5. The best empirical results show that they normally are only between 20 and 3 percent as large as the transfer effects. The allocative inefficiency effects of market power are usually so small that they are not much more than a rounding error in the analysis.

9. Enforcers and other plaintiffs have only been able to demonstrate the size of the allocative inefficiency effects of market power in court on rare occasions. I have found only one instance where this was done successfully. *See infra* Part II.B.

10. There often will be cost savings from firms getting together, even when they get together to fix prices. Savings can include a large number of types of efficiencies, such as decreased advertising and other sales expenses, and consumers no longer will have to engage in inefficient comparison shopping (after all, prices will be identical). *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 435 (1978). Bork lists seven efficiencies that can arise from horizontal price fixing, including optimizing local sales efforts, providing the mechanism for the transfer of information, assisting the achievement of advertising economies of scale, and breaking down reseller cartels to prevent the misuse of local reseller monopolies. *Id.*

These savings often will tend to cause me not to challenge an otherwise suspect cartel—almost no matter how high prices rise. Professor Williamson and others have showed that, for example, even a trivial, one fourth of 1 percent cost saving, usually will justify a merger likely to increase prices by ten percent. *See supra* note 2. Even a 1 percent cost savings often can offset the allocative inefficiency from a 20 percent increase. *Id.* This

> Except in those rare circumstances when we can prove the size of the allocative inefficiency we won't challenge mergers or collusion.[11] Even in these cases, moreover, unless prices rise so much that we can prove that the inefficiencies outweigh the cost savings, I won't prosecute.
>
> Why am I adopting the efficiency view of antitrust? Because I think it's the best approach. Candidly, I didn't even try to discern the intent of the Congress when it enacted the antitrust laws. I didn't examine the laws' legislative history or perform a "textualist" or "plain reading" analysis to determine whether Congress wanted to protect consumer surplus from being taken by price fixers or bid riggers in the form of supracompetitive pricing, or whether Congress cared about consumer choice. I think the goals of the antitrust laws are ambiguous, so I'm going to do what I think best.[12]

It is extremely unlikely that anyone who heads the Antitrust Division or the FTC would ever be so candid and transparent. But this sketch of some of the effects of an efficiency-only policy shows the importance of the inquiry that will follow. This Article will attempt to determine the goals of the current U.S. antitrust statutes in two very different ways.

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means that even though consumers will pay much more and all of this increase—as well as the cost savings—will go to the monopolist, this does not matter. So long as the merger is likely to be net efficient, and thus benefit society as a whole, I am going to allow it. In addition, there surely will be some cases where the enforcers will be able to prove that innovation will diminish. For a discussion of this prinicple, see Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 196–237 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

11. I certainly believe that the allocative inefficiency effects of market power could be proven in court under the right circumstances. But this is largely unknown territory. I have conceded that the transfer effects of market power do not count, and it usually will be extremely difficult for us to prove the size of the relatively small inefficiencies loss from market power. I am especially worried about challenging cartels where I am not sure of victory because if I fail enough times to show that allocative inefficiency exists and is so large it outweighs the cost savings, this could be the end of the per se rule against price fixing. Suppose, for example, I can only show a successful efficiency balance five times out of the first ten cases where defendants resist my prosecution of their cartel. The courts could erode or even repeal the per se rule because they would no longer believe price fixing or bid rigging is almost always anticompetitive. It is not impossible that if I have a tremendous amount of trouble proving that either bid rigging or cartels are net inefficient, for administrative simplicity the courts eventually could switch to per se legality.

12. In light of my approach, I realize that I will be in no position to criticize my successor if he or she decides that the antitrust laws are all about fighting the political power of big business or something else I consider crazy. They have as much right as I do to declare the statutes ambiguous and read almost whatever values they like into antitrust.

The courts might, of course, constrain me, or my successors. That is, unless I can convince the courts that congressional intent is ambiguous or irrelevant. If I win with this argument I will be able to impose my view of optimality for a while and, I concede, maybe my successors will as well. I do concede, however, that sharp changes in antitrust policy would not be good for the country.

Even if the courts constrain me, I can still have significant effects on our economy until this happens. Specifically, this will mean that lots of mergers to monopolies, joint ventures, bid rigging, and cartels will go forward. Some will be challenged by state enforcers, but there are not enough of them to take up the slack. Others will be challenged by private plaintiffs.

The first will be a traditional determination of congressional intent by examining the relevant legislative history: the congressional debates and committee reports. A traditional legislative history analysis of this issue was first performed by Judge Robert Bork in 1966, when he famously concluded that the legislative history showed that Congress's sole reason for passing the Sherman Act was to enhance economic efficiency.[13] I reanalyzed this same legislative history in 1982, except that these results concluded that Congress's primary concern was with preventing wealth transfers (a polite term for theft) from consumers to firms with market power, and that economic efficiency was only a secondary concern.[14]

Subsequent to this research a new approach to statutory interpretation has emerged, championed by Justice Scalia and known as the "textualist," "fair reading," or "plain meaning" approach.[15] To my knowledge neither Justice Scalia nor anyone else has ever undertaken a textualist analysis of the antitrust statutes to determine whether the goal of these statutes is to enhance efficiency, to prevent firms with market power from using market power to steal from consumers, to enhance consumer choice, or to accomplish some other purpose. This Article will undertake this task.

The results of both analyses demonstrate that Congress's primary concern was not with economic efficiency. Rather, the primary goal of the antitrust statutes can, overall, best be described as a concern with the transfer effects of market power.[16] Congress wanted consumers to be able to pay competitive prices—not supracompetitive prices—and condemned the use of market power to extract wealth (i.e., steal) from consumers. An alternative way to describe this concern is that the property right we today call "consumers' surplus" was defined and awarded to consumers. Supracompetitive prices were a concern not because of the allocative inefficiency they created, but because they constituted the theft of "consumers' surplus" by cartels and other firms that violated the antitrust laws.[17]

To be sure, some circumstances require special consideration: situations where non-price or choice competition should be paramount,[18] cases

13. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 26 (1966).

14. Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69–70 (1982), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065413.

15. For an explanation of this approach, see *infra* Part I.B.

16. The transfer concern is not the same thing as a concern with the distribution of wealth. When a poor person steals from a rich person, this is an unfair transfer of wealth—an improper taking of property—even though it results in a more even distribution of wealth. The wealth of the parties is irrelevant to the transfer or taking issue. This would be true for both a pickpocket and a cartel.

17. For an illustration of the allocative inefficiency effects and wealth transfer effects of market power, see *infra* Part II.A.

18. In some relatively unusual circumstances a price approach will not work very well. In circumstances such as the earlier hypothetical merger of every newsgathering operation in the United States, the congressional concern with non-price issues best can be described in terms of "consumer choice" or non-price competition. *See infra* Part III.

involving monopsony power,[19] and complexities involving overcharges to business consumers or overcharges that are passed through the distribution chain to indirect purchasers.[20] Efficiency was indeed a concern of the law.[21] Nevertheless, the overriding goal of the antitrust statutes was to protect consumers from theft. This Article's textualist analysis of section 2 of the Sherman Act, moreover, shows that the law is supposed to prevent and condemn all privately created monopolies, with no exception for monopolies created by accident or efficient business conduct.[22]

This Article concludes with a brief analysis of why an efficiency-only antitrust policy would be unduly weak: the relatively small size of the allocative inefficiency effects of market power, the tremendous difficulties an efficiency-only policy would place on the enforcers to prove anticompetitive effects in court, and the almost intractable difficulties that are likely to arise when we try to balance allocative efficiency and cost savings in court.

## I. WHAT CONGRESS ENACTED: STEALING FROM CONSUMERS AS THE LYNCHPIN OF ANTITRUST

There are many possible approaches to ascertaining what Congress intended when it enacted the antitrust laws.[23] This assumes, of course, that one honestly wants to do this. One might not want to determine Congress's intention, preferring instead to give wide latitude in statutory interpretation to the enforcers and/or the courts. Another implicit, although unstated, issue is the desire by government enforcers and courts to assume the power that comes from the ability to interpret statutes. Although of course they would deny this intention, the more power they desire, the less likely they are to faithfully attempt to discern congressional goals. Rather, they are

19. A "monopsony" is a market with a single buyer. By contrast, a "monopoly" is a market with a single seller. *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 233–36 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113927.

20. Professor Kirkwood observes that although Congress wanted to protect all consumers, regardless of where they were in the products' distribution chain, their primary focus was on protecting the "consumers" in markets in which sellers with market power operate. This should occur even if these consumers are businesses that sell these products to other consumers, and with recognition that consumers in downstream markets could be harmed. This also could be termed a concern with protecting "purchasers." *See* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425 (2013). In light of multistage distribution, it often is difficult or even impossible to determine whether certain practices have harmed "real consumers" or "end users" or "ultimate consumers." We could, instead, speak fairly in terms of "protecting purchasers" or "protecting buyers" who often will be dealing directly with the firms in question.

21. *See infra* notes 47–50.

22. *See* discussion *infra* Part I.B.3.

23. *See generally* James J. Brudney & Corey Ditzlear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205 (2000).

more likely to find that congressional intent is ambiguous and impossible to ascertain, thus freeing them, within limits, to interpret the statutes as they choose.[24]

This is an especially important subject because the issue of how much deference the decision makers should give to Congress is not an all-or-nothing decision. The result will often depend upon which side has the burden of proof and how certain the decision makers thinks they should be. If the standard is proof beyond a reasonable doubt as to what Congress intended, there probably is no way to determine its ultimate goals. But is a criminal law standard of proof appropriate?

Everyone agrees we should faithfully interpret and implement the words of the statutes if they are clear.[25] But what do we do when the words are ambiguous? We could attempt to interpret ambiguity by using our best judgment as to what Congress would have done if it had considered the question.[26] Although there are any number of approaches to dealing with the issue of congressional intent,[27] this Article will discuss the two that appear to be the most common and prominent: (1) a traditional or "purposivist"[28] analysis of the debates in Congress and the relevant committee reports at the time the antitrust laws were enacted; (2) a "textualist" or "fair reading" approach that uses only the "plain meaning" of the words of the statutes as those words were commonly used when the antitrust laws were enacted.

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24. Of course, this approach implicitly frees the enforcers' and judges' successors to do the same, and thus to reverse their decisions. Stare decisis might, of course, constrain them to some extent. Moreover, some enforcers could assume their viewpoint will prevail forever and thus be eager to take the risk that their successors will never be in a position to implement, for example, a "big business is bad/small business is good" approach to antitrust, at least not in their lifetime.

25. United States v. Mo. Pac. R.R., 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended."); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter.").

26. As Judge Bork noted, the task of ascertaining the will of Congress should be "an attempt to construct the thing we call 'legislative intent' using conventional methods of collecting and reconciling the evidence provided by the Congressional Record." Bork, *supra* note 13, at 7 n.2.

27. *See* Tiefer, *supra* note 23, at 207–10.

28. A traditional analysis of the legislative history of a statute, one that relied upon the congressional debates and committee reports, is sometimes called a "purposivist" analysis. *See generally* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. (forthcoming 2013); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 18 (2012) ("So-called purposivism, which has been called 'the basic judicial approach these days.'").

### *A. The Traditional Legislative History Approach: Using Congressional Debates and Committee Reports*[29]

The legislative history of the Sherman Act[30] contains many statements of concern by Senator Sherman[31] and other legislators[32] that the trusts and other businesses of the period had or would likely acquire enough power to raise prices. Judge Bork summarized this portion of the debates eloquently: "The touchstone of illegality is raising prices to consumers. There were no exceptions."[33] There is little disagreement that supracompetitive pricing was the preoccupation of the debates.[34]

The key question, however, is precisely why Congress objected when trusts, cartels, and monopolies raised prices to consumers. Supracompetitive prices cause two direct economic effects: the transfer of surplus from consumers to cartels (i.e., the stealing effect), and allocative inefficiency. Which one was Congress's concern? Were both?

The Sherman Act's legislative debates make this clear.[35] For example, Senator Sherman termed the higher prices "extortion,"[36] and "extorted wealth."[37] One Congressman referred to the overcharges as "robbery,"[38] and another complained that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people."[39] Another Congressman complained that the beef trust "robs the farmer on the one hand and the consumer on the other."[40] Another declared that the trusts were "impoverishing" the people through "robbery."[41] Another declared that monopolistic pricing was "a transaction the only purpose of which is to

29. This section is based upon material contained in Kirkwood & Lande, *supra* note 19, and Lande, *supra* note 14. The author wrote these pieces because he believes in the soundness of the traditional approach to ascertaining congressional intent.

30. For similar statements from the legislative history of the Clayton Act, see Lande, *supra* note 14, at 128. For similar statements from the legislative history of the Celler-Kefauver Act, see *id.* at 135–36. For similar statements from the legislative history of the Federal Trade Commission Act, see *id.* at 112–14.

31. *See* 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman) (noting that trusts tend to "advance the cost to the consumer"); *Id.* at 2460 (statement of Sen. Sherman) (observing that it is sometimes contended that trusts reduced prices to the consumer, "but all experience shows that this saving of cost goes to the pockets of the producer"); *Id.* at 2462 (statement of Sen. Sherman) (asking Congress to protect the public from trusts that "restrain commerce, turn it from its natural courses, increase the price of articles, and therefore diminish the amount of commerce").

32. *See, e.g.*, *id.* at 2558 (statement of Sen. Pugh) (noting that trusts effectively "destroy[] competition in production and thereby increas[e] prices to consumers").

33. Bork, *supra* note 13, at 16.

34. *See id.*; Lande, *supra* note 14, *passim*.

35. *See* Bork, *supra* note 13 (believing that allocative history was the primary concern of the legislature).

36. 21 CONG. REC. 2461 (quoting Sen. Sherman).

37. *Id.*

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

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

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

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

extort from the community . . . wealth which ought . . . to be generally diffused over the whole community."[42] Finally, one complained: "They aggregate to themselves great, enormous wealth by extortion."[43]

Do terms like "stealing," "robbery," "extortion," and "stolen wealth" sound like synonyms for allocative inefficiency? Or is it more likely that Congress in effect awarded the property right to what we today call "consumers' surplus" to consumers? Under this view, the taking of consumers' surplus by cartels and other business arrangements that violate the antitrust laws constitutes in effect the theft of consumer's property.

Congress wanted to protect consumers who purchased products and services; it made no distinction between wealthy and poor consumers, direct and indirect consumers, or business consumers and individual end-user consumers.[44] Nor did Congress seem concerned about the issue of who ultimately bore the cost of monopoly overcharges (i.e., Congress did not seem concerned whether direct purchasers absorbed all the overcharges or passed all or part of them on to the next level in the chain of distribution).[45] Rather, Congress could see that prices to those who purchased from a

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

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

44. As Prof. Kirkwood shows, the best way to phrase this concern is a primary concern with the direct consumers or purchasers in the markets at issue. *See generally* Kirkwood, *supra* note 20. Thus, the best and most straightforward way to embrace Congress's concern for "consumers" would be to equate it to a primary concern with the direct purchasers of goods and services sold by cartels, monopolies, etc. In other words, any direct purchaser should be deemed a "consumer" for antitrust purposes, regardless of what they decided to do with the good or service they purchased.

It would be a complicated, time-consuming, and useless task to attempt to determine precisely what happened to each good and service sold by a cartel. Depending upon the product, some would be consumed by direct purchasers, some would be resold, and others would be incorporated into different products. Otherwise, every price rise caused by a monopoly, cartel, etc., would have to be examined through an oftentimes long chain of production and distribution to determine whether it had been absorbed by intermediaries or whether, and to what degree, it had been passed on to consumers. This can be a very difficult undertaking. Firms that otherwise would have violated the antitrust laws should not be excused on the grounds that they "only" harmed business purchasers. Many of the complexities that would arise if the standard were limited to the welfare of ultimate consumers are analyzed in Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007). These problems can all be avoided, however, by focusing only upon the direct purchasers.

45. *See generally* Lande, *supra* note 14. While Congress frequently referred to "consumers," it did not appear to care only about ultimate consumers. Rather, Congress wanted to protect all who were overcharged. *Id.* Moreover, a number of decisions explicitly refer to protecting buyers, purchasers, or customers (not just consumers). For example, the Supreme Court noted in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983): "As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition." *Id.*; *see also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) ("The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher . . . . As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows."); *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 904 (6th Cir. 2003) ("[T]he very purpose of antitrust law is to ensure that the benefits of competition flow to purchasers of goods affected by the violation." (citing to the district court opinion)).

monopoly or cartel increased and enacted the antitrust laws to prevent this from happening.[46]

Of course, the Congresses that enacted the Sherman Act,[47] FTC Act,[48] Clayton Act,[49] and Celler-Kefauver Act[50] certainly did appreciate corporate productive efficiency. But they nevertheless passed the antitrust laws that in so many ways attacked these highly efficient corporations. If all they wanted was to encourage the form of industrial organization that was most efficient, Congress would have praised the trusts, not condemned them in the legislative debates.

46. A possible exception for a monopoly that acquired its position through superior efficiency will be discussed *infra* Part I.B.4.

47. 21 CONG. REC. 2457 (remarks of Sen. Sherman) ("[The bill] does not in the least affect combinations in aid of production where there is free and fair competition."); *Id.* at 2460 (remarks of Sen. Sherman) ("It is sometimes said of these combinations [the monopolistic trusts] that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer . . . . Experience has shown that they are the most useful agencies of modern civilization. They have enabled individuals to unite to undertake great enterprises only attempted in former times by powerful governments. The good results of corporate power are shown in the vast development of our railroads and the enormous increase of business and production of all kinds.").

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

49. *See, e.g.*, 51 CONG. REC. 14,223 (remarks of Sen. Thompson) (noting his desire to protect consumers and to encourage corporate efficiency: "The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring"). For other discussions of the legislative history, see Muris, *supra* note 2.

50. *See Hearings on H.R. 2734 Before the Subcomm. of the S. Comm. on the Judiciary*, 81st Cong. 61 (1949) (statement of Rep. Celler) (stating that a "main reason for antitrust laws is that we believe the competitive system is more efficient than monopoly"); *see also Hearings on H.R. 2734 Before the Subcomm. of the S. Comm. on the Judiciary*, 81st Cong., 140, 308 (1950) (statement of Sen. Donelly) (expressing concern with the bill's "effect on prices, the effect on productive efficiency").

On the contrary, the congressional debates[51] and committee reports[52] show that the antitrust laws primarily were enacted to prevent higher prices[53] and wealth transfers from consumers to firms with market power.[54] If Congress primarily had cared about enhancing economic efficiency, it would have enacted "protrust" laws, not "antitrust" laws.

### *B. A "Textualist," "Plain Meaning," or "Fair Reading" Analysis of the Antitrust Laws: What Would Justice Scalia Do?*

Justice Scalia has long been the chief advocate of a method of interpreting legislation known as the "textualist," "fair reading," or "plain

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51. For citations demonstrating this wealth transfer concern in the legislative debates over the Clayton Act, FTC Act, and Celler-Kefauver Act, see Lande, *supra* note 14, *passim*. To give just one vivid example, during the FTC Act debates Senator Lane identified the results of the problems as "the fraud and the theft which is being practiced upon the people of this country . . . which mulct the people of this country out of hundreds of millions of dollars each year . . . . [The people] are also being compelled to pay arbitrarily fixed and unjustly high prices for what they consume, they are being robbed." 51 CONG. REC. 13,223 (statement of Sen. Lane).

52. As an example of this concern, the Minority Report of the House Committee on Interstate and Foreign Commerce complained in their discussions of the bill that would become the FTC Act, that "[t]he common people are staggering under the burden they bear as a result of contributing extortionate profits to the trusts and monopolies." H.R. REP. NO. 63-533, pt. 3, at 5 (1914) (minority report) (Rep. Lafferty's views). Senator Newlands, the FTC Act's main sponsor and the Chairman of the Senate Committee on Interstate Commerce, framed the issue as a concern for "unreasonable and extortionate prices." *See* S. REP. NO. 63-597, at 25 (1914). Newlands also spoke in terms of an "unfair or unreasonable price." *Id.*

53. For examples of this concern in committee reports in the FTC Act deliberations, the goals of "protecting consumers against too high prices and [guarding] the interests of employees" were expressed by the House in H.R. REP. NO. 63-533, pt. I, at 4 (quoting from the *Preliminary Report of the Industrial Commission*, submitted to Congress in 1900). The Senate Committee on Interstate Commerce wanted to keep "within limited bounds the activities of a multitude of price-fixing associations in different branches of business, which, together with the great trusts, have been potent causes of the present high cost of living." S. REP. NO. 63-597, at 9.

54. Since the legislative history is so clear, one might ask how the efficiency orientation could have gained so much ground. There are three possible, nonexclusive explanations:

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

2. The only available alternative to the efficiency model during the transition to the Reagan Administration was the big is bad/small is good, social/political model, which was correctly perceived by decisionmakers as almost standardless and overly difficult to administer in a predictable manner. *See, e.g.*, Bork, *supra* note 13, at 9. By contrast, the wealth transfer approach is just as easy to administer, and just as predictable, as the efficiency model. *See infra* Part II.C. This wealth transfer is model was not, however, available at the dawn of the Reagan Administration, so it perhaps was natural that the decision makers instead opted for the model that economists were using—economic efficiency.

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

meaning" approach.[55] He has often been joined in this approach by other Supreme Court Justices.[56]

Justice Scalia expressly rejects the use of such traditional legislative history as the debates in Congress and the reports of congressional committees.[57] He explains: "In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled."[58] He explained further:

55. *See* SCALIA & GARNER, *supra* note 28, at 428, 436, 441; *see also* SCALIA, *supra* note 25. Justice Scalia makes an important distinction: "Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." SCALIA, *supra* note 25, at 23.

56. For examples, see Brudney & Ditslear, *supra* note 23, at 220–21, and Tiefer, *supra* note 23, at 216–17.

57. Scalia said, "To say that I used legislative history is simply, to put it bluntly, a lie." Debra Cassens Weiss, *Scalia Weighs In on Posner's Controversial Book Review, Calls Posner's Assertion "a Lie,"* ABA JOURNAL (Sept. 18, 2012), http://www.abajournal.com/news/article/scalia_weighs_in_on_a_controversial_book_review [hereinafter "Interview"]. Justice Scalia was responding to an article by Judge Posner. *Id.* Judge Posner responded as follows: "[Scalia] may not consider such a historical inquiry to be an exercise of 'legislative history,' because he defines legislative history very narrowly." *Text of Judge Posner's Respose* [sic] *to Justice Scalia*, THOMSON REUTERS (Sept. 20, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/Text_of_Judge_Posner_s_respose_to_Justice_Scalia/. Posner also said:

> His coauthor, Bryan Garner, does not define it so. Here is the definition of the term in Black's Law Dictionary (9th ed. 2009), of which Garner is the editor: "The background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates." The "background and events leading to the enactment" of the Second Amendment are the focus of the Heller opinion.

*Id.* Posner also said:

> [I]n seeking the original eighteenth-century meaning of the text of the Second Amendment Justice Scalia had been doing legislative history. His quest for original meaning had taken him to a variety of English and American sources from which he distilled the existence of a common law right of armed self-defense that he argued had been codified in the Second Amendment.

*Id.*

58. SCALIA, *supra* note 25, at 36. Scalia writes:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.

*Id*. at 17. Further, he quotes Holmes:

> "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means."

> Why would you think this [material—the legislative debates and committee reports—] is an expression of the legislature's intent? And the more you use that garbage, the less accurate it is. What—one of . . . the major—functions of . . . hot shot Washington lawyers is drafting legislative history. You send it up to the hill, and get a friendly Senator to read it into the record or something else, to change the meaning of the text that's adopted. So, you know, . . . it's crazy.[59]

Instead Justice Scalia attempts to ascertain the "plain meaning" of the text of statutes by making extensive use of material such as roughly contemporaneous dictionaries and legal decisions to define key terms.[60] Justice Scalia also examines the country's history at approximately the time of the legislation and the legislation's societal context to help define the particular words or phrases in the statutes. He does this even though it is contrary to the traditional approach for determining congressional intent:

> [A]ny legal audience knows what legislative history is. It's the history of the enactment of the bill. It's the floor speeches. It's the prior drafts of committees. That's what legislative history is. It isn't the history of the times. It's not what people thought it meant immediately after its enactment.[61]

### 1. Justice Scalia Has Not Performed a Textualist Analysis of the Relevant Antitrust Terms

Unfortunately, Justice Scalia has not performed a textualist analysis of any of the antitrust laws that address the overall goal or goals of the statutes or the efficiency/wealth transfer debate. Justice Scalia has authored three opinions,[62] three concurrences,[63] and three dissenting[64] opinions in antitrust

*Id.* at 22–23 (footnotes omitted).

59. *Newsmaker: Justice Antonin Scalia and Professor Bryan A. Garner*, THOMSON REUTERS (September 17, 2012), http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/Scalia_Reuters_transcript.pdf [hereinafter "Scalia Interview"]. Justice Scalia has also written:

> It is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question.

SCALIA, *supra* note 25, at 32.

60. *See* SCALIA & GARNER, *supra* note 28, at 33, 37. Immediately after Scalia introduces the "fair reading" method, on page 33, he cites three sources on guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, four contemporary dictionary definitions of key terms. *Id.* at 33–39.

61. Scalia Interview, *supra* note 59.

62. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

63. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 176 (2004) (Scalia, J., concurring); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 640–41 (1992) (Scalia, J., concurring); Texaco Inc. v. Hasbrouck, 496 U.S. 543, 576–81 (1990) (Scalia, J., concurring).

cases. Most do not even come close to undertaking a textualist analysis of the goals of the antitrust laws.[65] Nevertheless, some of these opinions are instructive illustrations of textualist analysis.

For example, in *Hartford Fire Insurance Co. v. California*,[66] Justice Scalia, writing for the majority in part and dissenting in part, performed a textualist analysis of the term "boycott," as it was used in the McCarran-Ferguson Act exception to the antitrust laws:

> Determining proper application of § 3(b) of the McCarran-Ferguson Act to the present cases requires precise definition of the word "boycott." It is a relatively new word, little more than a century old. It was first used in 1880, to describe the collective action taken against Captain Charles Boycott, an English agent managing various estates in Ireland . . . . Thus, the verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To "boycott" means "[t]o combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it."[67]

Justice Scalia then used the above dictionary definition to resolve a key legal dispute:

> Petitioners have suggested that a boycott ordinarily requires "an absolute refusal to deal on any terms," which was concededly not the case here . . . . We think not. As the definition just recited provides, the refusal may be imposed "to punish [the target] for the position he has taken up, or *coerce him into abandoning it.*" The refusal to deal may, in other words, be *conditional*, offering its target the incentive of renewed dealing if and when he mends his ways. This is often the case—and indeed seems to have been the case with the original Boycott boycott. Furthermore, other

In *F. Hoffmann-La Roche*, Justice Scalia declined to join the majority in part because of its extensive use of legislative history:

> I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

*F. Hoffmann-La Roche*¸ 542 U.S. at 176 (Scalia, J., concurring).

64. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 800–22 (1993) (Justice Scalia delivered the opinion of the Court with respect to Part I and delivered a dissenting opinion with respect to Part II); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 486–504 (1992) (Scalia, J., dissenting); Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 333–43 (1991) (Scalia, J., dissenting).

65. *See Omni Outdoor Advert., Inc.*, 499 U.S. at 370–84; *see also F. Hoffmann-La Roche*, 542 U.S. at 176 (Scalia, J., concurring); *Ticor Title Ins. Co.*, 504 U.S. at 640–41 (Scalia, J., concurring); *Eastman Kodak Co.*, 504 U.S. at 486–504 (Scalia, J., dissenting).

66. *Hartford Fire Ins. Co.*, 509 U.S. at 800–22 (Scalia, J., writing for the majority in part and dissenting in part).

67. *Id.* at 800–01 (footnote omitted) (quoting 2 OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989)).

> dictionary definitions extend the term to include a *partial* boycott—a refusal to engage in some, but not all, transactions with the target.[68]

This is significant because it illustrates Justice Scalia's use of roughly contemporaneous dictionary definitions (he used a 1950 dictionary to define a term in a 1946 law), a technique that will be discussed below.

The Scalia opinion that would have been most likely to undertake the relevant textualist analysis was *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* because the case involved the core meaning of section 2 of the Sherman Act.[69] Unfortunately, Justice Scalia's opinion did not undertake a textualist analysis of the overall meaning of section 2. He instead simply cited precedent[70] for his assertion that the Sherman Act contains an exception for a monopolist that gains its monopoly through historical accident or superior efficiency.[71]

Justice Scalia extensively analyzed the term "restraint of trade" in *Business Electronics Corp. v. Sharp Electronics Corp.* using a common law–based textualist analysis, but he was not looking for the ultimate goals of the Sherman Act.[72] Rather, he distinguished the idea of a "restraint of trade" from the understanding of which specific business practices restrained trade.[73] His opinion considered the common law antecedents of modern antitrust law, but did not involve the efficiency/transfer issue.[74]

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68. *Id.* (citations omitted) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 321 (2d ed. 1950) (defining "boycott" as "to withhold, wholly *or in part*, social or business intercourse from, as an expression of disapproval or means of coercion" (emphasis added)).

69. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

70. Justice Scalia does believe in the use of precedent and stare decisis. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

71. *Verizon Commc'ns Inc.*, 540 U.S. at 407. Justice Scalia stated:

> The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under § 2 of the Sherman Act, which declares that a firm shall not "monopolize" or "attempt to monopolize." It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

*Id.* (citations omitted) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

72. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988).

73. *Id.* Scalia wrote:

> In resting our decision upon the foregoing economic analysis, we do not ignore common-law precedent concerning what constituted "restraint of trade" at the time the Sherman Act was adopted. But neither do we give that pre-1890 precedent the dispositive effect some would. The term "restraint of trade" in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances . . . . The Sherman Act adopted the term "restraint of trade" along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890. If it were otherwise, not only would the line of *per se* illegality have to be drawn today precisely where it was in 1890, but also case-by-case evaluation of legality (conducted where *per se* rules do not apply) would have to be governed by 19th-century notions of reasonableness.

Finally, although Justice Scalia did not discuss the issue of the ultimate goals of the antitrust laws, it is instructive that in a concurring opinion in *Texaco Inc. v. Hasbrouck*, a Robinson-Patman Act case, he wrote:

> The language of the Act is straightforward: Any price discrimination whose effect "may be substantially . . . to injure, destroy, or prevent competition" is prohibited, unless it is immunized by the "cost justification" defense, *i.e.*, unless it "make[s] only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which [the] commodities are . . . sold or delivered." There is no exception for "reasonable" functional discounts that do not meet this requirement."[75]

This textualist discussion is noteworthy because it affirms the common sense idea that no exception should be implied in the law unless it is explicitly a part of the statute.[76]

Since Justice Scalia has not performed a plain meaning examination of the Antitrust laws to decide their goals, this Article will undertake the task using his methodology.[77] This Article will perform a textualist analysis of the antitrust statutes to help clarify which goal or goals Congress wanted to be embodied in these laws.

As discussed, if Justice Scalia's textualist analysis were applied to antitrust statutes, neither the Congressional debates nor the committee reports would be analyzed.[78] A textualist analysis would, however,

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> It would make no sense to create out of the single term "restraint of trade" a chronologically schizoid statute, in which a "rule of reason" evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.

*Id.* at 731–32 (citations omitted).

Justice Scalia also cited, with apparent approval, a pre–Sherman Act common law case. *Id.* at 731 (citing Gibbs v. Consolidated Gas Co., 130 U.S. 396, 409 (1889) (noting that the English case laying down the common-law rule that contracts in restraint of trade are invalid "was made under a condition of things, and a state of society, different from those which now prevail, [and therefore] the rule laid down is not regarded as inflexible, and has been considerably modified").

74. He wrote:

> Of course the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error. It is relevant, therefore, whether the common law of restraint of trade ever prohibited as illegal *per se* an agreement of the sort made here, and whether our decisions under § 1 of the Sherman Act have ever expressed or necessarily implied such a prohibition.

*Id.* at 732–33.

75. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 579 (1990) (alterations in original) (citation omitted).

76. This will be important in Part I.B.4 during the discussion of whether section 2 of the Sherman Act actually contains an "exception" for monopolies attained by superior efficiency.

77. This article does not agree with Justice Scalia that traditional legislative history should be ignored and a textualist analysis should instead be performed.

78. *See* SCALIA & GARNER, *supra* note 28, at 369 ("The false notion that committee reports and floor speeches are worthwhile aids in statutory construction.").

undertake a number of inquiries to ascertain what the statutes "plainly" mean. To do this the inquiry would examine:

> (1) The definitions of the key terms in dictionaries (Justice Scalia seems especially interested in the definitions of key words in contemporary dictionaries[79]), legal dictionaries, and legal treatises that existed when these laws were passed. Ideally we would find and analyze sources defining these terms when the antitrust laws were passed.[80]
>
> (2) Pre-1890 English common law cases should be examined to determine whether the federal antitrust statutes borrowed key terms from the common law and, if so, what they meant in common law decisions.[81] It could even be possible to make inferences from state antitrust statutes—and their subsequent interpretations by courts—that existed when the federal antitrust laws were passed, in case the federal laws borrowed key terms from a state statute.[82]
>
> (3) Another inquiry would be into how federal antitrust cases from the 1890s used these terms to help determine "what people thought it meant immediately after its enactment."[83] Did the definitions of these terms in

79. *See supra* note 60 and accompanying text. Immediately after Scalia & Garner introduce the "fair reading" method, on page 33, they cite three sources on guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, four dictionary definitions of key terms. SCALIA & GARNER, *supra* note 28, at 37.

80. SCALIA & GARNER, *supra* note 28, at 78 ("Words must be given the meaning they had when the text was adopted."); *see also id.* at 415–24.

81. *Id*. at 320 ("Cannon of Imputed Common-Law Meaning: A statute that uses a common-law term, without defining it, adopts its common-law meaning."); *see also id.* (where Justice Scalia cited, with apparent approval, a pre–Sherman Act common law antitrust case).

82. This surely is the weakest of the aids to interpretation because state statutes could be inconsistent with one another. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), Scalia examined state constitutional provisions and statutes to help determine what various terms in the Second Amendment meant:

> From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state . . . . That was also the interpretation of those state constitutional provisions adopted by pre–Civil War state courts.

Heller, 554 U.S. at 584–85 (citations omitted). Scalia also was guided by analogous state statutes:

> Many colonial statutes required individual arms-bearing for public-safety reasons—such as the 1770 Georgia law that "for the security and *defence of this province* from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of public worship." That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843.

*Id.* at 601 (emphasis added) (citations omitted) (quoting 19 COLONIAL RECORDS OF THE STATE OF GEORGIA 137–39 (A. Candler ed. 1911 (pt. 2)).

83. *See supra* text accompanying note 60. Justice Scalia noted the first interpretation of certain constitutional amendments in the first case to consider them, in a context that

the period just after the laws' enactments indicate, for example, whether the transfer effects of market power were meant to count in antitrust analysis? This is perhaps another way of giving effect to the doctrine of stare decisis: if a statute was interpreted one way shortly after it was enacted, that interpretation should be given respect.[84]

(4) A textualist analysis also would consider the "history of the times."[85] It would attempt to use the history of the period producing the antitrust

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suggests this was more likely to be their correct interpretation. SCALIA & GARNER, *supra* note 28, at 101–02.

84. In *Heller*, Justice Scalia used statutory interpretations of the Second Amendment that were from the period shortly after it was adopted as a guide to determine its meaning. As he explained:

> We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, however, we take issue with Justice Stevens' equating of these sources with postenactment legislative history, a comparison that betrays a fundamental misunderstanding of a court's interpretive task. "Legislative history," of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. "Postenactment legislative history," a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do . . . . The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service.

*Heller*, 554 U.S. at 605, 610 (citations omitted). Scalia also analyzed the meaning of "keep arms" and was guided by interpretations in cases decided shortly after the enactment of the Second Amendment. *Id.* at 583 n.7. In other parts of his opinion Justice Scalia also looked for guidance as to the meanings of critical terms by analyzing postenactment cases from the era:

> This is fully consistent with the ordinary definition of the militia as all able-bodied men . . . . That is what Congress did in the first militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia.

*Id.* at 596 (quoting Act of May 8, 1792, 1 Stat. 271) (citation omitted). Further:

> Writing for the court in an 1825 libel case, Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." The analogy makes no sense if firearms could not be used for any individual purpose at all . . . . Between 1789 and 1820, nine States adopted Second Amendment analogues.

*Id.* at 602 (quoting Commonwealth v. Blanding, 20 Mass. 304, 313–14 (1825)) (citations omitted).

85. *See* SCALIA & GARNER, *supra* note 28, at 399 ("The false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires."). Scalia and Garner then discuss how the history of gun use in the United States helps interpret a gun control statute. *Id.* at 400–02; *see also supra* note 60. Moreover, Scalia quotes, with apparent approval, Chief Justice Taney:

laws to help ascertain what Congress meant when it used terms like "monopolize" or "restraint of trade" in the Sherman Act.

(5) Finally, a textualist analysis would not imply any exception that is not plainly evident in the words of the statutes.[86] If an antitrust law contains an explicit exception, then of course that exception would be respected. But no nonexplicit *exceptions* would be inferred in order to achieve some overall goal or purpose of the statute.[87]

### 2. Section 1 of the Sherman Act: Concerns with Price and Choice

Section 1 of the Sherman Act prohibits "every contract, combination or conspiracy in restraint of trade."[88] Can the operative term, "in restraint of trade," best be characterized in terms of efficiency, of the transfer effects of market power, or in some other manner?

Could "restraint of trade" be a synonym for conduct that was productively inefficient? Were the trusts, monopolies, and cartels of the period condemned because they were so inept at making their products that their inefficient production "restrained trade"? Was Congress so concerned with corporate activity that was productively inefficient that it passed the Sherman Act primarily to help save corporate costs? For example, did Congress condemn Rockefeller because Standard Oil was so inefficient at producing oil?[89]

I am not aware that the trusts existing during the period when the Sherman Act was passed were ever accused of being inefficient. Although

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> "In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*: and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

SCALIA, *supra* note 25, at 30 (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845) (emphasis added)).

86. *See supra* text accompanying note 78. "Yeah. I mean, that—the law is a law. It's not up to the judges to make exceptions to the law because—it seems to me that—compassion—that's—that's not the judge's job." Scalia Interview, *supra* note 58, at 23.

87. Scalia believes no exception should be inferred to achieve a greater purpose because:

> [E]ven if you think our laws mean not what the legislature enacted but what the legislators intended, there is no way to tell what they intended *except* the text. Nothing but the text has received the approval of the majority of the legislature and of the President, assuming that he signed it rather than vetoed it and had it passed over his veto. Nothing but the text reflects the full legislature's purpose. Nothing.

Antonin Scalia, & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

88. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty . . . ." 15 U.S.C. § 1 (2006).

89. Were many people in 1890 in effect saying, "We condemn Rockefeller because he is so inefficient at producing petroleum products! His inefficiency is harming our country!"?

many unkind things were said about Rockefeller and Standard Oil, I am not aware he was ever even accused of inefficiently running his oil company.[90] Nor did the Department of Justice, when prosecuting the Standard Oil trust, ever assert that the company was inefficient or that it should be found to have violated the Sherman Act because it was inefficient.[91]

Indeed, the trusts were among the most efficient businesses of their times.[92] They were in large part responsible for price levels that fell, not rose, both in general and for many specific products that were the subject of trusts during the period just before the Sherman Act's passage.[93] If efficiency had been Congress's overriding concern, it would have enacted a "protrust law" not an "antitrust law."

Rather, Congress's concern for business arrangements that "restrain trade" can "plainly" equate to a concern with arrangements that "reduce" trade, as the terms "restrain" and "reduce" are similar. A normal result of arrangements that reduce trade or output,[94] of course, is higher prices.[95]

In addition, a contract, combination, or conspiracy that "restrains" trade can distort or change it, rather than simply diminish its size or quantity. In other words, a "restraint" of trade also could distort the competitive array of offerings in the market, not just the market's total output (which would affect market price). Indeed, the antitrust statutes are not written in terms of the "price" effects of market power.

The antitrust statutes focus instead on more general principles. Section 1 of the Sherman Act is concerned with arrangements in "restraint of trade," not arrangements that "lead to higher prices." A fair reading of the Sherman Act suggests that every important element of trade—price, quality, variety, etc.—was meant to be the concern of the antitrust statutes.[96]

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90. *See, e.g.*, Ida M. Tarbell, *The Rise of the Standard Oil Company*, MCCLURE'S MAGAZINE, Dec. 1902, at 115–28. *See generally* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (1998).

91. For an excellent and thorough analysis of the *Standard Oil* case, see James May, *The Story of* Standard Oil Co. v. United States, *in* ANTITRUST STORIES 7 (Eleanor M. Fox & Daniel A. Crane eds., 2007). Professor May analyzed, inter alia, over 1,800 pages of briefs filed by both parties and informed the author of this Article that he never found an accusation by the Department of Justice that Standard Oil was inefficient, or an attempt by the government to condemn the company for being inefficient. *Id.*

92. *See* Lande, *supra* note 14, at 90–93.

93. *Id.* at 97–99.

94. Some conduct, such as price discrimination, might "restrain trade" even if it does not increase prices. Price discrimination can change the terms and conditions of trade, but not reduce overall output. *See* Robert H. Lande, *Should Predatory Pricing Rules Immunize Exclusionary Discounts?*, 2006 UTAH L. REV. 863, 880 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121473. In addition, firms might fix prices at levels they claim are reasonable. Since the prices were fixed, however, trade would be restrained even if the prices were set at a reasonable level. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234–37 (1899).

95. *See, e.g.*, Williamson, *supra* note 2, at 33. Reduced output and higher prices are almost identical concepts. Price discrimination is an exception, as shown in Lande, *supra* note 94, at 867–68.

96. As John Forrest Dillon noted in his 1890 treatise, JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, 430 n.3 (4th ed. 1890): "A

A concern with practices that raise prices also was suggested in an 1880 common law "restraint of trade" case, *Skrainka v. Scharringhausen*.[97] The case was concerned with the price effects of market power[98] and, more specifically, with the transfer effects of higher prices: "So, an association among all the proprietors of boats on the great canals of New York and Pennsylvania to keep up the price of freight and divide the profits has been held void."[99]

A price concern also was suggested in two of the earliest Sherman Act cases. *Addyston Pipe & Steel Co. v. United States*[100] held that the higher price would operate as a direct restraint upon the trade, and therefore any contract or combination that enhanced the price might in some degree restrain the trade in the article.[101]

*United States v. Joint-Traffic Ass'n* similarly held:

> The natural and direct effect of the two agreements is the same, viz. to maintain rates at a higher level than would otherwise prevail . . . . The natural, direct, and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce; and an agreement whose first and direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce.[102]

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monopoly exists when the sale of any merchandise or commodity is restrained to one or to a certain number; and it has three inseparable consequents—the increase of the price, the badness of the wares, the impoverishment of others." *Id.* (citation omitted). The 1601 common law case, the *Case of Monopolies*, similarly held: "The 2d (*c*) incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before . . . ." Darcy v. Allein [The Case of Monopolies], [1601] 77 Eng Rep. 1260. Normally antitrust can simply focus upon prices, an approach that prevents transfers of wealth from consumers to firms with market power, even though non-price competition is often crucial to consumer welfare. This is because normally a market that is price competitive also will produce optimal non-price competition. But this is not always true. *See supra* Part III.B.

97. 8 Mo. App. 522, 523 (1880).

98. *Id*. at 526. ("[T]he essential question is one of monopoly and of injury to the public. Where the grain-dealers of a whole town formed a secret combination to stifle all competition, and thus to control and keep up the price of grain: that was held void.").

99. *Id.* However, the restraints in question only covered part of the market, so presumably the firms lacked market power and the restraints therefore should not be condemned under either a total welfare or a consumer welfare approach:

> The partial nature of the restraint in the case before us seems to be not colorable, but real. The agreement is amongst the quarrymen of one district of one city, and it does not appear that it embraces all of them. There is no evidence that it works any public mischief, and the contract is not of such a nature that it is apparent from its terms that it tends to deprive men of employment, unduly raise prices, cause a monopoly, or put an end to competition. It is limited both as to time and place; and we know of no case in recent times in which a contract such as the one before us has been declared illegal.

*Id.* at 527.

100. 175 U.S. 211 (1899).

101. *Id.* at 241.

102. 171 U.S. 505, 565, 577 (1898).

Of course, supracompetitive pricing leads to both allocative inefficiency and wealth transfers from consumers to firms with market power.[103] Thus, if we equate "restrain trade" with a concern with higher prices, this does not help determine whether the statute embodies an allocative inefficiency concern, a wealth transfer concern, or both.

Nevertheless, in most cases a price standard will be identical to a wealth transfer concern.[104] Neither would, for example, permit a merger to a monopoly or a cartel that raised prices, even if permitting this would be net efficient. An efficiency standard, by contrast, would permit mergers, joint ventures, and cartels leading to higher prices so long as the arrangement was net efficient.[105] For this reason a "plain meaning" of section 1 of the Sherman Act would decide the first two hypotheticals in this Article the same way as the wealth transfer (stealing) approach. Neither hypothetical, however, would be decided the correct way under an efficiency approach.

A price concern is, moreover, consistent with the definitions of "restraint of trade" used in a contemporaneous legal treatise:

> § 125. What constitutes restraint of trade. It certainly is not true that every contract which reduces competition or that restrains trade is illegal; . . . The natural result of the sale of a railroad to a rival line destroys competition and generally restrains, that is, lessens traffic by increasing rates. And the same could be said in every case where a merchant buys out his rivals and secures a monopoly in a town.[106]

Another source did not use the exact phrase "restraint of trade," but it did employ two close terms: "Agreements tending to monopoly—i.e., 'any combination among merchants to raise the price of merchandise, to the detriment of the public,' are illegal."[107]

103. *See, e.g.*, Williamson, *supra* note 2, at fig.1.

104. The price and wealth transfer standards are identical except when firms are able to practice certain forms of price discrimination. *See* Lande, *supra* note 94, at 884.

105. *See, e.g.*, Williamson, *supra* note 2, at 18–19.

106. *See* 1 THOMAS CARL SPELLING, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 144 (1892). The treatise adds: "There is substantial harmony between the English and American definitions of monopoly, the two countries agreeing that contracts entered into by and between two or more corporations, the necessary result of whose performance will crush and destroy competition, are illegal." *Id.*; *see also* United States v. E.C. Knight Co., 156 U.S. 1 (1895) ("It was further averred that the American Sugar Refining Company monopolized the manufacture and sale of refined sugar in the United States, and controlled the price of sugar; that in making the contracts, Searles and the American Sugar Refining Company combined and conspired with the other defendants to restrain trade and commerce in refined sugar among the several states and foreign nations, and that the said contracts were made with the intent to enable the American Sugar Refining Company to restrain the sale of refined sugar in Pennsylvania and among the several states, and to increase the regular price at which refined sugar was sold, and thereby to exact and secure large sums of money from the state of Pennsylvania, and from the other states of the United States, and from all other purchasers; and that the same was unlawful, and contrary to the said act.").

107. CHARLES FISK BEACH, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS 112 n.1 (1891).

For a similar concern with price in one of the earliest Sherman Act cases, *United States v. Trans-Missouri Freight Ass'n*, the defendants were charged with unjustly raising prices.[108] The case held:

> [T]he action of this corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by everyone who consumes any of the property transported over the line of railway.[109]

This 1897 case is especially significant because, in addition to a price concern, it recognizes and manifests concern with the transfer effects of market power (i.e., it condemns prices that "exact and procure great sums of money from the people" and is concerned with the "net profit coming to the farmer").[110] But it is not concerned with market power's allocative inefficiency effects.

In summary, section 1 of the Sherman Act's prohibition against contracts, combinations, or conspiracies "in restraint of trade" was not directed at business arrangements that are inefficient. Rather, a "restraint of trade" usually means a practice that restricts output and therefore raises prices. When on-price competition is important, it means a practice that distorts some non-price aspect of consumer choice. This plain reading of the term "restraint of trade" has been reinforced by an analysis of both some of the earliest antitrust cases and also contemporary legal treatises.

### 3. Section 2 of the Sherman Act: A Concern that Supracompetitive Pricing Steals from Consumers

Section 2 of the Sherman Act holds: "Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty."[111] A search of contemporary sources for the key section 2 term, "monopolize" and the related term, "monopoly" found several definitions relevant to the efficiency/wealth transfer debate. "A monopoly exists when the sale of any merchandise or commodity is restrained to one or to a certain number; and it has three inseparable consequents, the increase of the price, the badness of the wares, the impoverishment of others."[112]

Even though this treatise spoke of a "monopoly" rather than the verb "to monopolize," it shows that in 1890 the wealth transfer effects of monopolies were well understood. A contemporaneous treatise was even more explicitly focused on the transfer effects of market power and defined the word "monopolize" as follows:

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108. 166 U.S. 290, 292 (1897).
109. *Id.* at 336.
110. *Id.* at 299, 336.
111. 15 U.S.C. § 2 (2006) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty . . . .").
112. DILLON, *supra* note 96, at 430 n.3 (citation omitted).

> In whatever there is opportunity for competition on equal terms, as in trading, insurance, banking and the like, there can be no valid objection to an unlimited number of corporations; but where the necessities of the public or geographical conformation have provided vantage points as in the business of transportation, furnishing light and water to cities and districts, and in certain manufactures the number which can operate within a given territory successfully is often restricted to one, and *monopoly with the opportunity for oppression, extortion and accumulation of colossal wealth is a necessary consequence.*[113]

This source thus appeared to use "monopoly" and "monopolize" interchangeably. By contrast, none of the nineteenth century sources seemed to be concerned with—or even aware of—the fact that monopoly pricing leads to allocative inefficiency.

The conclusion that the wealth transfer effects of market power were a concern is reinforced by a plain reading analysis of pre-1890 state antitrust statutes. Although many pre-1890 state antitrust statutes do not help clarify the issues, the preamble to the Florida law against monopolization[114] implies that the state's General Assembly knew about monopolization's transfer effects, but not its allocative inefficiency effects: "An act to prevent during the existing war Monopolies, Extortions and Speculations in Bread-stuffs and other articles of general use and consumption, and to make such acts criminal, and to provide penalties for the same."[115] The use of the word "extortion" implies a concern over the transfer of wealth, not economic inefficiency. This session law is similar in scope to an 1861 act of the General Assembly of Georgia which predates the Florida statute and could have served as its model.[116] The Georgia statute further expanded on the extortion articulation stating that:

> *Be it further enacted*, That any person or persons who shall exact, demand, or receive exorbitant, unjust, or unreasonable prices for any of the articles enumerated in the foregoing sections of this Act, shall be guilty of the crime of extortion; and upon conviction thereof, shall be punished by fine or imprisonment, or both, in the discretion of the Court;

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113. SPELLING, *supra* note 106, at 20 (emphasis added).

114. *See* SCALIA & GARNER, *supra* note 28, at 217 ("A preamble, purpose clause, or recital is a permissible indicator of meaning."). Further, the provision contained in section two of "The Acts and Resolutions" of the General Assembly of Florida stated that:

> *Be it further enacted*, That all and every person or persons who shall monopolize any of the articles above mentioned, with intent to produce a scarcity of such article or articles in the market, or of raising the price or prices of such articles, or either of them, or if any person or persons shall purchase, procure, or receive any of the articles specified in the preceding section and hold the same for the purpose of engrossing the market and raising the price of such article or articles, such persons or persons so offending shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than five hundred dollars, nor exceeding five thousand dollars.

Act of Nov. 17, 1862, ch. 1360, § 2, 1862 Fla. Laws 36, 36.

115. *Id.*

116. *See* Act of Dec. 20, 1861, Pub. L. No. 62, § 2, 1861 Ga. Laws 66, 67.

> the fine not to exceed one thousand dollars, and the imprisonment not to exceed six months.[117]

The law's references to "exorbitant, unjust, or unreasonable prices" verifies that in 1890 people understood and objected to what we today call the wealth transfer concern. But this language has nothing to do with allocative inefficiency.

This same theme emerged in pre–Sherman Act common law antitrust cases. The 1601 case, *Darcy v. Allein* (*The Case of Monopolies*)[118] noted the wealth transfer effects of monopolies in several ways:

> The sole trade of any . . . monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for *the end of all these monopolies is for the private* gain of the patentees . . . there are three inseparable incidents to every monopoly against the commonwealth, *sc.* 1. That (e) the price of the same commodity will be raised . . . .[119]

Further:

> The 2d (c) incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, *regards only his private benefit*, and not the common wealth. 3. It (d) tends to the *impoverishment of divers artificers and others* . . . *who now will of necessity be constrained to live in idleness and beggary* . . . .[120]

This passage contains four references to the transfer effects of monopolies and one to non-price effects. Similarly, in the 1844 common law case of *Evans v. Harlow*,[121] the defendant was charged with the offense of "monopolizing high prices at the expense of the public, by stating a falsehood."[122] The court recognized the wealth transfer effects of monopoly pricing by finding that the defendant that stated "that he [was] the sole inventor, manufacturer and patentee, thereby monopoliz[ed] high prices *at the expense of the public*."[123]

Similarly, *The King v. Waddington*,[124] a common law case from 1800, also demonstrated judicial distaste for the transfer effects of monopolistic practices. The case involved "[s]preading rumours with intent to [e]nhance the price of hops."[125] The court determined that it was a crime to: "by undue means to enhance [the price] . . . that which the common law of the land has ordained *for the protection of the poor, in preventing the advancing of the price of those commodities without which they cannot*

117. *Id.*
118. Darcy v. Allein (The Case of the Monopolies), [1601] 77 Eng. Rep. 1260.
119. *Id.* at 1263 (emphasis added).
120. *Id.* (emphasis added).
121. [1844] 114 Eng. Rep. 1384.
122. *Id.* at 1386.
123. *Id.* at 1385 (emphasis added).
124. [1800] 102 Eng. Rep. 56.
125. *Id.* at 56.

*exist.*"[126] The court focused its opinion on the importance of freedom of trade and that these laws have the goal of "protecting the poor man against the avarice of the rich"[127] and maintained that the law is necessary "[f]or the sake of the public, and especially of the poorer part of His Majesty's subjects."[128] As a result, the common law was intended to remove "a temptation to rich men to speculate upon the price of the necessaries of life at the risk and expence of the poor."[129]

The same wealth transfer idea arose in the earliest Sherman Act Supreme Court cases. The very first Sherman Act case to reach the Court, *United States v. E.C. Knight Co.*,[130] made this point. The majority opinion held that "when [a corporation] becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a *tribute* can be *exacted* from the community, []is subject to regulation by state legislative power."[131] The complaint over the transfer effects of market power also found its voice in Justice Harlan's concurring opinion:

> The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight . . . . "I take it," said Gibson, J., "a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of *extortion* or of mischief."[132]

The court further held, "Those interested in its operations will be satisfied with nothing less than to have the whole population of America *pay tribute* to them."[133]

In summary, evidence from contemporary legal treatises, pre-1890 State antitrust statutes, English common law cases, and some of the earliest Sherman Act cases all demonstrate that section 2 was concerned with the wealth transfer effects of monopoly power. But there is no evidence of even an awareness that monopolies could be inefficient or that monopoly pricing could lead to allocative inefficiency.

#### 4. Section 2 of the Sherman Act: A No-Fault Monopoly Statute

A textualist analysis of section 2 of the Sherman Act leads to a startling result. Under a textualist approach, section 2 should be interpreted to prohibit all monopolies, not just monopolies acquired by anticompetitive

126. *Id.* at 64 (emphasis added).
127. *Id.*
128. *Id.*
129. *Id.* at 65.
130. 156 U.S. 1 (1895).
131. *See id.* at 11 (emphasis added).
132. *Id.* at 26–27 (emphasis added).
133. *Id.* at 43 (emphasis added). Similarly, a district court in an 1891 case, *American Biscuit & Manuf'g Co. v. Klotz*, similarly complained about "the prices [that] would be in danger of being arbitrarily and exorbitantly fixed." 44 F. 721, 725 (E.D. La. 1891).

conduct.[134] The Sherman Act should not contain an exception for efficient monopolists or firms that achieved their monopoly by historical accident.

Section 2 of the Sherman Act prohibits anyone who shall "monopolize, or attempt to monopolize."[135] The statute never defines "monopolize" and uses it in place of the more straightforward term "monopoly." It is difficult to know whether "monopolize" was intended to mean the same as "monopoly," was meant to be a broader or narrower term, or simply has a different meaning. The statute's prohibition against firms that "monopolize" could have been meant to encompass only the subset of conduct that creates a monopoly through anticompetitive means (the current legal requirement for a section 2 violation).[136] However, a "plain meaning" textualist approach leads to a broader meaning: a firm illegally "monopolizes" if it was either a monopoly at the time of the suit, or if it was in the process of acquiring a monopoly. The statute contains no exception for a monopoly acquired through superior efficiency.

During the Sherman Act's legislative debates, just before the final vote, Senator Edmunds defined the term "monopolize." Although normally a textualist approach would not care about anything uttered during a Congressional debate, Senator Edmund's remarks should be significant even to a textualist because he said that Congress should employ in the Sherman Act the meaning of "monopolize" in a well-known contemporary dictionary:

> I have only to say . . . that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb 'to monopolize': 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea . . . . 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district . . . .[137]

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134. The author of this article is not advocating a no-fault approach to monopoly. This is, however, the logical result of a textualist analysis.

135. *See* 15 U.S.C. § 2 (2006).

136. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

137. 21 CONG. REC. 3153 (1890). This is part of an exchange that took place at the very end of the Sherman Act debates. Although the following would not interest a textualist because it is a legislative debate, it would interest a traditionalist because it constitutes the only known references in the debates to the issue of whether all monopolies should be found to be in violation of the statute. Senator Kenna asked:

> Is it intended by the committee, as the section seems to indicate, that if an individual . . . by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act?

He continued:

> Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a

> considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?

*Id.* at 3151.

Senator Edmunds gave a direct response to Senator Kenna's hypothetical:

> [I]n the case stated the gentleman has not any monopoly at all . . . he has not got the possession of all the horned cattle in the United States. He has not done anything but compete with his adversaries in trade, if he had any, to furnish the commodity for the lowest price. So I assure my friend he need not be disturbed upon that subject.

*Id.* at 3151–52. Senator Edmund's response indicates that he believed that no monopolization was involved in the hypothetical, so he did not really consider the need for an exception for a firm that achieved its monopoly solely by superior skill.

Senator Hoar then gave his answer:

> [I]n the case put by [Senator Kenna, if] . . . a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, [unless] it involved something like the use . . . [of unfair] competition like the engrossing, the buying up of all other persons engaged in the same business.

*Id.* at 3152.

Senator Edmunds then provided the final answer to Senator Kenna's question:

> I have only to say . . . that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb 'to monopolize': 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea. Like the sugar trust. One man, if he had capital enough, could do it just as well as two. 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade . . . . [W]e were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, of one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it.

*Id*.

The Sherman Act, forbidding any person to "monopolize" or "attempt to monopolize" was then passed by the Senate. *Id.* at 3153.

This crucial segment of the debate deserves careful consideration. Senators Hoar and Edmunds provided opposite answers to Senator Kenna's question. Senator Hoar clearly did not consider a firm to be guilty of "monopolization" if it "got the whole business" by skill and efficiency alone. Senator Edmunds, however, defined "to monopolize" as merely "[t]o engross or obtain by any means." Edmunds intended that "if one person . . . did it, it was just as offensive and injurious to the public interest as if two had combined to do it." Edmunds clearly condemned every monopoly, although by his first response he did not consider the hypothetical situation given to describe a monopoly. Thus, it would appear that these statement should be construed as offsetting one another, although, if a judgment had to be made, since Senator Edmunds spoke last and was one of the main sponsors of the bill, his statements could perhaps be said to carry greater weight. The fact that this discussion took place at the very end of the Sherman Act debate also could very well mean that it embodied Congress's final view on the subject. However, these statements were also less able to be corrected or opposed by Senator Sherman or other legislators.

It should be emphasized, however, that this exchange in this footnote would not be of interest to a textualist because it consists of legislative debate.

Nevertheless, if the main thrust of the statute is kept in mind, including Congress's basic condemnation of monopoly pricing despite a potential sacrifice of efficiency, the Sherman Act does not appear to provide an exception for an efficient monopolist.

This shows that "monopolize" simply meant to acquire a monopoly. The definition was not restricted to acquisitions through anticompetitive conduct.

Moreover, as Justice Scalia reminds us in *Texaco Inc. v. Hasbrouck*, no exception should be read into a statute unless it is explicitly contained in the statute.[138] Indeed a pre–Sherman Act Webster's Dictionary[139] contains a definition of "Monopolize" that is virtually identical to the dictionary definition read on the Senate floor by Senator Edmund:

> 1. To purchase or obtain possession of the whole of any commodity or goods in the market with the view of selling them at advanced prices, and of having the power of commanding the prices; as, to *monopolize* sugar or tea.
>
> 2. To engross or obtain by any means the exclusive right of trading to any place, and the sole power of vending any commodity or goods in a particular place or country; as, to *monopolize* the India or Levant trade.
>
> 3. To obtain the whole; as, to *monopolize* advantages.[140]

This is virtually the same as the definition of monopolize in another contemporary source, a legal treatise from 1889:

> To monopolize, as defined by Webster, is, 1. To purchase or obtain possession of the whole of any commodity or goods in the market, with the view of selling them at advanced prices, and having the power to command the prices. 2. To engross or obtain by any means the exclusive right of trading to any place, and the sole power of vending any commodity or goods in a particular place or country.[141]

These definitions of "monopolize" include all monopolies, even those acquired through superior efficiency. Like the text of section 2, they contain no exceptions. Thus, a textualist analysis of section 2 of the Sherman Act shows that any firm that gains a monopoly commits the offense of "monopolization," and there should be no exception for a firm that acquires its monopoly by efficient methods. Today's prevailing legal standard[142] is simply inconsistent with a textualist or plain meaning reading of the statute: the Sherman Act condemns all monopolies.

Indeed, the earliest Sherman Act cases used the terms "monopolize" and "monopoly" interchangeably. For example, *E.C. Knight Co.* was concerned with "monopoly" despite the statutory language of "monopolize":

> [Held], that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life . . . "to protect trade and commerce against unlawful restraints and monopolies," . . . . "The

138. *See* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 579 (1940).

139. *See* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

140. *Id.* at 727.

141. SANFORD MOON GREEN, CRIME: NATURE, CAUSES, TREATMENT, AND PREVENTS 308 (1889) (emphasis omitted).

142. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

> fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. . . . [I]n other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community,—is subject to regulation by state legislative power.[143]

Similarly, an 1891 district court case, *American Biscuit & Manuf'g Co. v. Klotz*,[144] held:

> [T]he law-maker has used the word [monopolize] to mean "to aggregate" or "concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others . . . . Now it is to be observed that these statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc . . . .[145]

This court thus appeared to expressly reject the need for anticompetitive conduct. The opinion continued:

> The offense is defined to "combine in the form of trust, or otherwise, in restraint of trade or commerce," and "to monopolize, or attempt to monopolize, any of the trade or commerce." To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense.[146]

The terms "monopolize" and "monopoly" were thus used interchangeably, with no exception for an efficiently acquired monopoly or a monopoly acquired by historical accident. As the Court noted in the 1897 case, *United States v. Trans-Missouri Freight Ass'n*, no exceptions to the antitrust statutes should be implied:

> In other words, we are asked to read into the act, by way of judicial legislation, an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do . . . . These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this Court, by a process of judicial legislation wholly unjustifiable.[147]

As noted earlier, when Justice Scalia authored the opinion in *Trink*o he did not undertake a textualist analysis of section 2.[148] He simply cited

143. *Id.* at 6, 10–11.
144. 44 F. 721 (C.C.E.D. La. 1891).
145. *Id.* at 724–25.
146. *Id.* at 725.
147. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 340 (1897). The Court also held that "no exception or limitation can be added without placing in the act that which has been omitted by Congress." *Id.* at 328.
148. *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004).

precedent for his assertion that the Sherman Act contains an exception for a monopolist that gained its monopoly through superior efficiency.[149] Justice Scalia has written that he does respect precedent and stare decisis, and this could explain his approach to the issues in *Trinko*.[150]

Nevertheless, the pro-monopoly tone of Scalia's language in *Trinko* went much further than that of any other Supreme Court monopolization opinion. Until *Trinko*, the prevailing standard was merely the 1966 *Grinnell* requirement of "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[151] This approach does not come close to the extensive stridently pro-monopoly language of *Trinko*.[152] Moreover, before *United States v. Grinnell Corp.*,[153] the approach from *United States v. Alcoa* prevailed;[154] the *Alcoa* opinion, although opaque and extremely difficult to understand, is best interpreted as a no-fault monopoly standard—all monopolies are illegal.[155]

Elsewhere, Justice Scalia has denounced the type of expansion of precedent he undertook in *Trinko*.[156] Moreover, in the recent *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* decision,[157] Justice Scalia voted to overturn precedent from 1911 that the Supreme Court in two decisions (opinions that Justice Scalia joined!) had reconsidered but ultimately declined to overturn.[158] In his dissenting opinion in *Leegin*,

149. Scalia wrote: "It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Id.* at 407 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

150. *See supra* note 84.

151. *Grinnell Corp.*, 384 U.S. at 570–71.

152. Compare the *Grinnell* language, in note 136 *supra*, with Scalia's language in *Trinko*:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.
>
> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.

*Trinko*, 540 U.S. at 407–08.

153. 384 U.S. 563 (1966).

154. *See* 148 F.2d 416 (2d Cir. 1945).

155. *See id.*

156. *See* Connick v. Thompson, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring) (decrying "*sub silentio* expansion" of substantive precedent).

157. 551 U.S. 877 (2007).

158. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

much of Justice Breyer's focus was on how the 1911 precedent should be upheld on the basis of stare decisis.[159] It is this precedent that Justice Scalia ignored when he joined Justice Kennedy's opinion, perhaps because adherence to stare decisis did not yield Scalia's preferred approach to antitrust law.

Why did Justice Scalia avoid undertaking a textualist analysis in *Trinko*, but instead used the opportunity to move the law of monopolization even further away from the result that a textualist analysis of this issue would have produced? Could the explanation be that a textualist interpretation would have led to a result—no exception for monopolists that gained their monopoly without undertaking anticompetitive conduct—contrary to his policy preferences?

### 5. Section 7 of the Clayton Act

The core of section 7 of the Clayton Act prohibits mergers the effect of which "may be substantially to lessen competition or to tend to create a monopoly."[160] A textualist or "plain meaning" analysis of section 7 straightforwardly leads to the conclusion that if a merger "may be substantially"[161] likely to lead to a monopoly, or to "tend to lessen

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159. *Leegin*, 551 U.S. at 918 (Breyer, J., dissenting). Justice Breyer states:

> We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice . . . . Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. I am not aware of any case in which this Court has overturned so well-established a statutory precedent.

*Id.* (citations omitted).

> With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. Justice Scalia, writing separately in another of our cases this Term, well summarizes that law. And every relevant factor he mentions argues against overruling *Dr. Miles* here.

*Id.* at 923 (citations omitted).

> In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies overruling a recent constitutional decision, *Wisconsin Right to Life, Inc.*, (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in judgment), but (2) failing to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not . . . . All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

*Id.* at 929 (citation omitted).

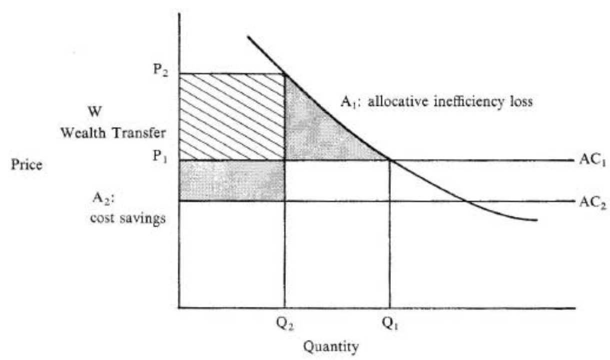
160. *See* Clayton Act of 1914 § 7, 15 U.S.C. § 18 (2006).

161. The "may be substantially" language gives rise to the merger incipiency doctrine. For an explanation of this doctrine, see Robert H. Lande, *Resurrecting Incipiency: From* Von's Grocery *to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134815.

competition,”[162] the merger should be blocked. The statute contains no exception for a merger likely to create an efficient monopoly, so none should be read into section 7. Just as section 2 of the Sherman Act contains no exception for a firm that efficiently “monopolizes,” section 7 of the Clayton Act contains no exception for a merger that produces an efficient “monopoly.” Nor should an exception be implied for the second part of the statute: if competition is likely to be impaired enough that prices are likely to rise, the merger should be prohibited.

As Professor Williamson first demonstrated, it certainly is possible that a merger could lead to a monopoly that would raise prices, yet be net efficient.[163] Professor Williamson analyzed horizontal mergers using an approach that balanced efficiencies and showed how mergers might lead simultaneously to higher prices and also to cost savings. He showed how the allocative inefficiency caused by merger’s supracompetitive pricing might well be more than offset by cost savings caused by the merger.[164] Under an efficiency approach, these mergers should be permitted even though both the cost savings and the transfer resulting from the higher prices would accrue to the monopolist. As the following diagram illustrates:

Figure 1: Standard Monopoly Power Diagram




An efficiency approach would compare the allocative inefficiency triangle, $A_1$, with the productive efficiency gain (cost savings), the lower left rectangle $A_2$. The merger should be blocked only if the triangle is larger than the rectangle, because only these mergers are net inefficient. Under a wealth transfer approach, however, any merger likely to lead to higher prices to consumers should be blocked. This means that if the postmerger firm “may be substantially” likely to raise prices and therefore to give rise to the existence of the upper rectangle, *W* (the wealth transfer effect of

162. The “tend to create a monopoly” language also gives rise to the merger incipiency doctrine. *Id.* at 876.

163. *See supra* note 2 and accompanying text.

164. *See supra* note 2 and accompanying text.

market power), the merger should be blocked. With only those few exceptions when non-price considerations would be crucial, [165] an approach that prevented these wealth transfers would be identical to a "price" approach.

A "plain meaning" approach should essentially equate "may be substantially to lessen competition or to tend to create a monopoly" with a reasonable probability[166] of higher prices to consumers. The same result would arise if we focused on either the "may be substantially to lessen competition" or the "tend to create a monopoly" part of the statute. "Lessen competition" is the same as or similar to a concern with supracompetitive prices. "Tend to create a monopoly" also gives rise to the same concern. For either half of the statute, a textualist or plain meaning analysis would mean that any merger likely to lead to higher prices should be blocked without exception. A textualist analysis of the Clayton Act would lead to a price standard with no exception for an efficient monopolist created by merger under either of this statute's two tests.

Indeed, this plain meaning of the statute is consistent with the definitions contained in a roughly contemporaneous source*:* "Agreements tending to monopoly—i.e., 'any combination among merchants to raise the price of merchandise, to the detriment of the public,' are illegal."[167]

The only way the antimerger statutes could be read to permit a net efficient merger to monopoly would be a procrustean argument: terms like "lessen competition" and "tend to create a monopoly" are almost infinitely malleable terms of art that we are for some reason going to equate to "efficiency," so we are going to creates an exception for efficiency creating mergers. This would, however, be the very opposite of a "plain meaning" or textualist analysis. Although terms like "competition" and "monopolize" are indeed ambiguous, a "plain meaning" analysis of a statute that prohibits mergers that may "substantially lessen competition" or "tend to create a monopoly" should not be read as a codeword for a system that permits mergers to monopoly so long as they are net efficient. The antimerger statute contains no exceptions.

#### 6. Implications From the "History of the Times"[168]

If there were any doubts about Congress's overriding desire to protect consumers from being forced to paying supracompetitive prices to firms with market power, it is noteworthy that when the Sherman Act was passed in 1890 even economists were barely aware of the concept we today call

165. *See* 15 U.S.C. § 18. For exceptions, see *infra* Part III.B, explaining the use of the "choice" approach when non-price competition is important.

166. For a much more detailed explanation of how likely it must be that the merger raise prices and an analysis of the merger incipiency doctrine, see *supra* note 161.

167. BEACH, *supra* note 107, at 112 (quoting Arnot v. Pittston & Elmira Coal Co., 68 N.Y. 558, 559 (1877)).

168. For Justice Scalia's use of the "history of the times" to determine the meaning of statutes, see *supra* note 85 and accompanying text.

"allocative inefficiency."[169] In fact, the allocative inefficiency triangle that modern members of the antitrust community see so often (illustrated in Part III.B.5 above) never appeared in the 1890 edition of Alfred Marshall's famous and pathbreaking *Principles of Economics* treatise.[170] Further, although contemporary economists were familiar with this concept,[171] there is no reason to believe they had any influence on the passage of the Sherman Act.[172]

Even though Congress's main complaint about the trusts of the late 1800s was not that they caused allocative inefficiency, could Congress primarily have been concerned with corporate productive efficiency? Did Congress pass the Sherman Act primarily to save corporate costs and increase corporate productive efficiency? For example, did Congress or the public in effect denounce Rockefeller because Standard Oil was so inefficient at producing oil?

As noted in Part I.B.2, a search found no evidence Rockefeller was ever even accused of inefficiently running Standard Oil.[173] Nor did the government, when it prosecuted the Standard Oil trust, ever assert that the company was inefficient, or that it violated the Sherman Act because it was inefficient.[174] On the contrary, the trusts were among the most efficient corporations of their times.[175]

This examination of the history of the times leaves the consumer protection explanation as that which is most consistent with the evidence. Congressional anger over perceived[176] higher prices meant Congress was concerned about consumers paying more to trusts, monopolies, and cartels. Neither of the efficiency explanations (congressional anger in 1890 because higher prices caused allocative inefficiency, or congressional anger because the Rockefellers of the day were inefficient at production) is consistent with the history of the times.[177]

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

170. *See* ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (1890). Although he devoted seventeen pages of the 1890 edition of this landmark treatise to "The Theory of Monopolies," only one footnote included a reference to the concept, and the allocative inefficiency triangle we know so well today was not drawn anywhere in this book. *Id.* at 466 n.1.

171. *See id.*

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

173. *See supra* note 90 and accompanying text.

174. *See supra* note 91 and accompanying text.

175. *See* Lande, *supra* note 14, at 90–93.

176. While Congress perceived that the trusts of the period were raising prices, the actual situation is much more complex. *Id.* at 97–98.

177. As a double check, I challenge each reader of this article to find ten intelligent friends and ask each: "Why might Congress have condemned cartels for raising prices?" I strongly doubt that any of them—other than friends with antitrust or economics training—would guess that the main problem with cartels is that they cause economic inefficiency.

In sum, a textualist analysis shows that the key antitrust terms are either ambiguous,[178] or help support the primacy of the wealth transfer goal for antitrust. Nothing from the historical record, by contrast, fairly can be interpreted as suggesting that the antitrust statutes are only concerned with efficiency.

## II. THE ALLOCATIVE INEFFICIENCY EFFECTS OF MARKET POWER: SMALL AND UNDULY DIFFICULT FOR PLAINTIFFS TO PROVE

If the antitrust laws were interpreted so that their sole goal is to enhance economic efficiency, the principal problem with market power would be its effects on allocative inefficiency.[179] The allocative inefficiency effects of market power, however, are relatively small. They are also extremely difficult for plaintiffs to prove in court. For these reasons, an antitrust regime centered around the prevention of allocative inefficiency would be unduly weak, perhaps so weak that the antitrust laws would cease to function effectively.

### *A. The Relatively Small Size of Allocative Inefficiency Compared to the Transfer Effects of Market Power*[180]

The manner in which the standard competition-to-monopoly diagram is drawn makes the allocative inefficiency effects of market power appear to be half as large as its transfer effects.[181] Judge Easterbrook, for example, drew a similar diagram, made a number of conventional and commonly used assumptions, and on this basis showed that allocative inefficiency is 50 percent as large as the transfer effects on average.[182]

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The author has asked his antitrust law students these questions on many occasions, and the students always find the efficiency explanations implausible.

178. Section 5 of the FTC Act prohibits "unfair methods of competition." *See* 15 U.S.C. § 45(a)(1) (2006). Its language does not clarify whether this law's principle concern is with efficiency, wealth transfers, consumer choice, or with something else. However, a "plain reading" of this statute fairly suggests that the term "unfair" must include more than "economic efficiency." Congress did not, after all, enact a statute that prohibits "inefficient methods of competition." However, I have been unable to track down contemporaneous sources that further clarify the meaning of the term "unfair methods of competition," other than sources used in a traditionalist analysis of the legislative history. For these sources, see Lande, *supra* note 14, at 106–51.

179. In addition, there also could be instances where a merger, for example, would diminish innovation, and diminished innovation is another form of inefficiency. For a discussion of this issue, see Averitt & Lande, *supra* note 10, at 240. Second, it is possible that wealth that normally would be acquired by the firm with market power instead would be transformed into inefficient rent-seeking behavior. This is sometimes called the Posnerian Costs of monopoly. *See* Lande, *supra* note 14, at 78–79 n.54.

180. This section is based upon John M. Connor & Robert H. Lande, *Cartels As Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657.

181. *See supra* fig.1.

182. *See* Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 455 (1985). As Judge Easterbrook observed, the two-to-one ratio depends upon the assumptions of linear demand and supply, and "[t]hese curves doubtless are not linear, but legal rules must be derived from empirical guesses rather than exhaustive investigation." *Id.*

If Judge Easterbrook were correct, this would mean that "what's wrong" with market power—a crucial issue in an antitrust world that often trades off anticompetitive and procompetitive effects—would be tripled if the transfer effects of market power were added to its allocative inefficiency effects, and both were considered to be anticompetitive. It is, however, extremely unlikely that the allocative inefficiency from market power is on average half as large as its transfer effects.

The evidence shows that allocative inefficiency effects of market power are on average much smaller relative to the transfer effects. Unfortunately, we do not know for a statistically significant number of typical cartels or monopolies how large either effect is. My coauthor on another project, Prof. John Connor, surveyed the literature on the relative sizes of the allocative inefficiency and transfer effects of market power. He calculated a representative ratio or range based on economic theory and the best empirical literature on cartels and monopolies. Dr. Connor also was able to locate a number of technically impressive empirical studies of monopolies and cartels that provided both estimates, and he also made estimates based upon a number of relatively realistic theoretical assumptions.[183]

Dr. Connor found that on average the allocative inefficiency effects are probably only 3 percent to 20 percent as large as the transfer effects.[184] There's an alternative way to phrase this finding. If you start with the inefficiency effects of market power and then include its transfer effects, "what's wrong" with market power would increase by at least a factor of five, and maybe even by a factor of thirty-three. Conversely, if the transfer effects are not counted, the allocative inefficiency effects of market usually would be so small they usually would be outweighed by even a tiny cost savings.[185]

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183. An earlier estimate of these ratios, albeit for the economy as a whole, was calculated in F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 667–78 (3d ed. 1990). They evaluated and compared empirical estimates of the relative sizes of the deadweight loss (0.5 to 2.0 percent of GNP) and transfer effects (probably at the lower end of the range of 3 to 12 percent) due to the exercise of market power in the whole U.S. economy in the 1950s to 1970s. Economy-wide analyses tend to produce lower welfare losses than do disaggregated industry studies, but the effect on the ratio of interest is uncertain. *See id.* at 664. Despite the many caveats expressed by Scherer and Ross about these numbers, their average deadweight loss/transfer ratio appears to be roughly 28 percent. The lowest ratio is perhaps about 8 percent and the highest 36 percent.

An efficiency approach that ignored the wealth transfer effects of market power would tend to permit mergers and even collusion in markets with inelastic demand, such as insulin. By contrast, markets for luxury goods would tend to have demand that is much more elastic. Market power in these markets would thus tend to produce larger amounts of allocative inefficiency. Ironically, an efficiency based antitrust policy would tend to permit price increases for necessities and be more likely to challenge higher prices for nonessential goods! *See* Email from Sandeep Vaheesan to Robert H. Lande (Feb. 13, 2013, 10:30 a.m. EST) (on file with author).

184. *See* Connor & Lande, *supra* note 180 at 460.

185. For the particular requirements, see *supra* note 2.

*B. The Very Heavy Burden of Demonstrating Allocative Inefficiency Would Be on the Enforcers*

My recent search for U.S. federal antitrust cases that calculated the allocative efficiency effects of market power found no positive results.[186] Apparently there has been only one U.S.[187] case that has even claimed to attempt this undertaking in a published opinion, *United States v. BNS Inc*.[188] This case purported to calculate the allocative inefficiency losses (also known as the deadweight welfare losses) as follows:

> If the injunction thwarts the takeover, the injunction will deprive BNS of ownership and control of a company that BNS has calculated to be worth at least $420,000,000 more than the preexisting market value. This is irreparable harm. The injunction will deprive Koppers' shareholders of a premium in the same amount. This is irreparable harm. . . . The reason is that BNS is confident it can make Koppers more productive, and hence more profitable, than Koppers is on its own . . . . Assuming BNS is successful, the takeover is efficient in that it transfers assets to new owners who can deploy them more productively—to the extent that the nation's economic welfare will increase by upwards of $420,000,000.
>
> . . . .
>
> The injunction imperils the takeover and so threatens to choke off this large increase in economic welfare. In addition, the injunction will set a precedent that may discourage efficient transfers of control in the future.
>
> . . . . The public interest in efficient transfers relates to a possible deadweight loss in the economy of $420,000,000. The balance of hardships weighs heavily against Koppers—against the injunction. The district court abused its discretion by granting the injunction.[189]

However, the $420 million potential gain discussed in this case almost certainly does not constitute a true deadweight loss. Rather, it appears to be

186. On September 14, 2012, Robert Pool searched Westlaw, LexisNexis, and Bloomberg for cases containing "antitrust" or "Sherman Act" and also containing "allocative efficiency," "allocative inefficiency," or "deadweight loss" or "deadweight welfare loss." His searches found 74, 68, and 72 cases, respectively. None of these cases calculated the size of the allocative inefficiency. A 1991 article similarly reported that allocative inefficiency had never been awarded in an antitrust case. David C. Hjelmfelt & Channing D. Strother, Jr., *Antitrust Damages for Consumer Welfare Loss*, 39 CLEV. ST. L. REV. 505 (1991).

187. There also was a Canadian antitrust case that calculated the size of the allocative inefficiency effects of market power. The allocative inefficiency was found to be roughly 1/14 as large as the transfer effects of the market power in question (3 million versus 43 million Canadian dollars). *See* Alan A. Fisher, Robert H. Lande & Stephen F. Ross, *Legalizing Merger to Monopoly and Higher Prices: The Canadian Competition Tribunal Gets It Wrong*, 15 ANTITRUST MAGAZINE, no. 1, 2000, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358448. The Canadian Competition Tribunal predicted a proposed propane merger would raise prices by 8 percent, which came to $43 million, and also produce another $3 million in allocative inefficiency losses (a 7 percent ratio). *Id.* The anticipated allocative inefficiency of approximately $3 million was approximately 0.5 percent of the combined firms' anticipated annual sales of $585 million. *Id.*

188. 848 F.2d 945 (9th Cir. 1988).

189. *Id.* at 953 (footnote omitted).

a control premium, a potential productive efficiency gain, a potential savings in *X* efficiency, and/or potential monopoly profits. None of these is the same as the allocative inefficiency effects of market power.

Strikingly, however, there is a line of cases, beginning with *Rebel Oil Co. v. Atlantic Richfield Co.*,[190] which holds that an act is anticompetitive only when it harms allocative efficiency—*and* raises prices:

> Accordingly, an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.[191]

It is difficult to know what is meant by the requirement that to be anticompetitive an act both raise price *and* harm allocative inefficiency. One possibility is that the court is using a pure efficiency standard and wants to be clear that plaintiff must demonstrate more than supracompetitive prices: it must demonstrate that the higher prices result in allocative inefficiency, not just a transfer of wealth to the alleged violator. Alternatively, the court might have in mind a practice such as RPM, which can raise prices for reasons that can be explained by efficiencies.[192] In these circumstances the RPM would cause higher prices, yet be efficient. Or the court could simply be using the terms in an imprecise manner.

Regardless, a number of cases that follow *Rebel Oil* explicitly place the burden of proving the allocative inefficiency harms of market power on plaintiffs. For example, *Jacobs v. Tempur-Pedic International, Inc.*[193] held:

> The plaintiff has the burden of demonstrating damage to competition with "specific factual allegations." Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality. Higher prices alone are not the "epitome" of anticompetitive harm (as Jacobs claims). Rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act . . . . By "anticompetitive," the law means that a given practice both harms allocative efficiency *and* could "raise[ ] the prices of goods above competitive levels or diminish[ ] their quality," in addition to other possible anticompetitive effects such as those above.[194]

190. 51 F.3d 1421, 1433 (9th Cir. 1995); *see also* Hilton v. Children's Hosp. San Diego, 315 F. App'x 607, 609 (9th Cir. 2008) ("[T]he antitrust laws are only concerned with acts that harm 'allocative efficiency and raise[] the price of goods above their competitive level or diminish[] their quality.'" (quoting Poolwater Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001))); *see also* Tunis Bros. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1992); Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1564 (7th Cir. 1991); *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1151 (W.D. Wash. 2005) ("Generally, the test for harm to competition is whether consumer welfare has been harmed such that there has been a decrease in allocative efficiency and an increase in price.").

191. *Rebel Oil*, 51 F.3d at 1433; *cf.* Brook Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–24 (1993) (below-cost pricing is not anticompetitive in itself because, although it causes allocative inefficiency, it brings lower aggregate prices in the market).

192. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

193. 626 F.3d 1327 (11th Cir. 2010).

194. *Id*. at 1339 (citations omitted).

Additionally, consider *United National Maintenance, Inc. v. San Diego Convention Center Corp.*[195]:

> Plaintiff must show Defendant's conduct "harms consumer welfare," i.e., "it harms both allocative efficiency and raises the price of goods above competitive levels or diminishes their quality." Allocative inefficiency occurs when market participants who can use resources most efficiently lack access to those resources because of a defendant's conduct.[196]

Thus, the enforcers and private plaintiffs' task of demonstrating the allocative inefficiency effects of market power would lead antitrust into virtually uncharted waters that no plaintiff has ever navigated successfully, with the burden of proof on plaintiffs. Because proof of the allocative inefficiency effects of market power has virtually never been accomplished successfully in an antitrust case, it is difficult to know how often the enforcers would be able to demonstrate its existence or magnitude in litigation settings.

### *C. An Efficiency Balancing Is Likely To Be Unduly Complex Compared to a Price (or Wealth Transfer or Stealing) Test*[197]

A wealth transfer or "price to consumers" approach has another advantage over an economic efficiency standard. The price standard is more workable because its modeling is more straightforward. Under the price standard, one must describe the industry and identify the values of a few underlying parameters to determine how large cost savings would have to be to prevent the price from rising or the output from falling.[198] This task alone is extremely difficult.[199] However, an economic efficiency standard would be more complex and require much more information. Unlike a price (wealth transfer) standard, an efficiency-based approach would require the decision maker to also evaluate the potential efficiency gains from a merger even after determining that the merger would probably lead to an increase in price and a fall in output. This tradeoff analysis would require that one know the firm's marginal cost and marginal revenue schedules over the relevant output ranges,[200] in addition to all the information needed to analyze a merger under the price standard.

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195. No. 07-CV-2172 BEN (JMA), 2010 WL 3034024 (S.D. Cal. Aug. 03, 2010).

196. *Id.* at *7 (quoting *Rebel Oil*, 51 F.3d at 1433).

197. This subsection is based upon Fisher, Johnson & Lande, *supra* note 2, at 809–13. *See also* Alan A. Fisher, Robert H. Lande & Walter Vandaele, *Afterword: Could a Merger Lead to Both a Monopoly and a Lower Price?*, 71 CALIF. L. REV. 1697 (1983); Alan Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580 (1983), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701785.

198. *See* Fisher, Johnson & Lande, *supra* note 2, at 809–13.

199. *See id.*

200. To use an economic efficiency criterion, one must examine the effects of changes in prices and output levels. Such model building would be vastly more complex than model building for an unchanged output and would also require restrictive (perhaps unrealistic) assumptions of the behavior of marginal cost and marginal revenue as output changes. This complexity underlies our finding that the price criterion is simpler and more workable than the economic efficiency standard in the context of oligopoly. For a discussion, see *id.*

The price standard also has an important empirical advantage. It may sometimes be possible to observe after the fact (for a joint venture, for example) whether the price rose and output fell. By contrast, the tradeoff under an economic efficiency test—whether marginal costs fell sufficiently to offset the adverse effects of reduced output—usually would elude hindsight even if prices could be shown to rise.

Economic efficiency advocates often recognize the administrative complexity of their standard and therefore propose a simplified operational approximation—an output rule that is virtually identical to the price standard![201] Indeed, when the Reagan Administration proposed legislative reform of the Clayton Act in 1986, it recommended using an explicit price standard to evaluate mergers.[202]

An efficiency standard would also need to assess, in those circumstances where price increased, the likelihood that the requisite cost savings would actually arise.[203] Even when a transaction or arrangement will increase efficiency, the adjustment could be stormy, and the firms' marginal costs may decline only after a lengthy period. Moreover, at least one of the firms might have achieved comparable efficiency gains through less anticompetitive means, such as a licensing arrangement, joint venture, or less anticompetitive scenario.

The tradeoff calculations would typically be complex in practice, especially given the creativity of antitrust attorneys and economists. During litigation each side would have experts with very different opinions of the appropriate model and values of the parameters. Each side would try to convince or confuse a judge whose training and experience would typically be neither in economics nor in business.

The legal system is far better suited to resolving "either-or" disputes—will price increase or will it not increase—than to balancing factors in a multivariable analysis—will cost savings decrease enough to compensate for the allocative inefficiency effects of the higher prices. This is especially

201. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 31–33 (1984) (proposing a series of filters in an attempt to ensure that only practices likely to result in reduced output or increased prices would be subject to the Rule of Reason); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 21 (1981) (proposing to make a restriction's effect on output a central feature of an assessment of whether it increases competition); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 16–17 (1977) (proposing to determine the permissibility of restrictions on distribution by measuring their effects on output).

202. The Merger Modernization Act of 1986 proposed changing section 7 of the Clayton Act from a ban on mergers "substantially [likely] to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18 (1982), to a ban on mergers likely to "increase the ability to exercise market power." S. 2160, 99th Cong. § 2(a) (1986). The proposed bill defined the ability to exercise market power as "the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time." *Id.* § 2(d).

203. Experts have tended to make grossly inaccurate predictions that, to be accurate, must include predictions of how far into the future efficiencies will occur, and an appropriate discount rate. These additional complexities can affect the computations of both efficiency gains and inefficiency losses from mergers. *See* Fisher & Lande, *supra* 197, at 1619–24.

true under the constraints of litigation, which could include preliminary injunction settings.[204] Indeed, both acquiring firms and the antitrust agencies have a poor record in predicting efficiency effects in actual cases,[205] and the agencies and reviewing courts are likely to make incorrect decisions a high percentage of the time.

## III. WHEN CONSUMER CHOICE CONSIDERATIONS ARE CRUCIAL

The antitrust statutes are not written in terms of the price effects of market power. They focus instead on more general principles. Section 1 of the Sherman Act, for example, is concerned with arrangements in "restraint of trade,"[206] not arrangements that "lead to higher prices." Section 2 prohibits "monopolization" of "commerce,"[207] not "monopoly pricing." As noted above, a contract, combination, or conspiracy that "restrains" trade can merely distort or change it, rather than simply diminish its size or quantity. In other words, a "restraint" of trade also could distort the competitive array of offerings in the market, not just the market's price offerings. A fair reading of the Sherman Act suggests that every aspect of competition important to consumers—price, quality, variety, etc.—was meant to be the concern of the antitrust statutes.[208]

Normally, however, antitrust can simply focus on prices—an approach that prevents transfers of wealth from consumers to firms with market power—even though non-price competition is often crucial to consumer welfare. This is because normally a market that is price competitive also will produce optimal non-price competition. But this is not always true.

Suppose the twenty leading media companies—including television networks, radio networks, and newspaper chains—all wanted to merge the entirety of their news operations. This surely would lead to tremendous cost saving efficiencies in the costs of reporting the news. But would it lead to any price increases? Perhaps not. After all, these news operations would all be competing for advertising dollars and personnel with many other television and radio shows and also with a vast number of internet operations. Price effects would be very difficult to show.

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204. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534–42 (1973) (discussing the notion of "polycentric" decision making in the design defect context). Professor Henderson drew this concept from Lon L. Fuller, *Adjudication and the Rule of Law*, 54 AM. SOC'Y INT'L L. PROC. 1 (1960), and M. POLANYI, THE LOGIC OF LIBERTY 170–84 (1951).

205. *See* Fisher, Johnson & Lande, *supra* note 2, at 783 n.23.

206. *See supra* note 88 and accompanying text.

207. 15 U.S.C. § 2 (2006).

208. As noted in DILLON, *supra* note 96, at 430 n.3 ("A monopoly exists when the sale of any merchandise or commodity is restrained to one or to a certain number (11 Co. 86); and it has three inseparable consequents,—the increase of the price, the badness of the wares, the impoverishment of others."). The *Case of Monopolies*, similarly holds: "The 2d . . . incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before . . . ." Darcy v. Allein (*The Case of Monopolies*), [1601] 77 E.R. 1260, 1263; *see also supra* note 118.

However, in case this combination might produce some price effects, also assume that these twenty media companies all agreed with the enforcement authorities that if they were allowed to merge, they would not raise the price of anything including advertising rates, newspapers, or any other priced item.[209] Therefore this merger would generate tremendous efficiencies but would not lead to any price increases. Under a price or efficiency approach to competition law it should be permitted.

But it should not be permitted under the consumer choice approach to antitrust law, because the most serious harms from this newsgathering merger can best be expressed in terms of a loss of the consumer choice that the free market otherwise would bring. This choice can be illustrated by perspectives, editorial independence, and the quality and varieties of approaches to news coverage. A choice approach to antitrust would reflect these concerns much better than antitrust law centered around price or efficiency.

The Supreme Court recently stressed the importance of non-price competition in *Leegin*, explaining that it is desirable when competition gives "consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[210] There are a large number and variety of cases that cannot be explained just by a quest for efficiency or low prices. The best way to analyze and explain these cases is in terms of consumer choice.[211]

With this as background, the remainder of this section will first define the consumer choice approach to competition law—what it means, including how it differs from the efficiency or price approaches, and how it often is embodied in current U.S. decisions. Second, this section will discuss specific types of situations where a consumer choice focus makes or would make a difference. In every case it would produce better results than the efficiency or price approaches.

### *A. What Is the "Consumer Choice" Approach to Antitrust Law?*

If you examine every type of antitrust law violation—from price fixing to predation—and ask what they have in common, the answer is that they all significantly restrict consumer choice. They all significantly and artificially distort or diminish the choices that otherwise would be offered by the free market. Three brief examples are: (1) cartels, which certainly do this, by replacing the price and non-price options that should result from competition, by price and non-price terms set by collusion; (2) mergers that

209. Also assume that all twenty companies also agreed not to lower the wages they paid their employees. For this reason the merger would not lead to monopsony concerns.

210. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007).

211. In addition to the examples in this Article that document the use of the consumer choice approach to antitrust law, see Averitt & Lande, *supra* note 10, at 196–237, and Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713–22 (1997), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134798.

lead to market power; and (3) monopolization by predation, which also leads to fewer price and non-price choices than the free market would offer. In fact, every antitrust law or competition law violation distorts consumer choices.[212]

You might now wonder how a consumer choice approach differs from either a price approach or an efficiency approach? It includes both. It includes price considerations because price is almost always an important choice variable for consumers. It also includes efficiency because efficiencies can affect choices, especially in the long run.

But, crucially, the choice approach also includes a heightened concern with every significant non-price dimension of competition that consumers care about. In theory these factors are supposed to be considered under every approach. But as a practical matter, under a price or efficiency approach, factors such as service, innovation, quality, privacy, and variety are as a practical matter sometimes relegated to the footnotes of the analysis, where they are too often forgotten. The consumer choice approach, by contrast, in effect moves non-price issues up into the text where they play a much more prominent role in the analysis and result. Near the end of this Article, the evolution of the U.S. Merger Guidelines will illustrate the differing emphases that have been given to choice issues over time.

There are other crucial elements of a consumer choice approach that should be stressed. First, not every decrease in consumer choice counts as an injury to competition. Only significant decreases count, which would not include, for example, a reduction from ten choices down to nine! Second, more choice is not necessarily good, because too much choice can cause confusion and can as a practical matter mean that costs increase unduly.[213] For this reason, the goal of competition policy should not be to maximize consumer choice. Rather, it should be to eliminate practices that artificially restrict the choices that the free market would have provided. Third, as noted earlier, every competition law violation reduces consumer choice, but the converse is not true. It is not true that every reduction in consumer choice is a competition law violation. Some reductions in consumer choice—such as when a monopolist reduces its variety of offerings—do not violate any law. Other reductions in choice are consumer protection violations.[214]

### *B. When Would the Consumer Choice Approach Make a Difference?*

At this point you might well be thinking that of course competition law should be concerned about more than just price. You might say that non-price issues should certainly count and should count heavily. But, if a market is competitive in terms of price, won't it also be competitive in

212. *See* Averitt & Lande, *supra* note 211, at 718–20.
213. *See* Averitt & Lande, *supra* note 10, at 184 n.23, 191–95.
214. *See* Averitt & Lande, *supra* note 211, at 720–22.

terms of non-price issues? For example, if a market has four firms, and if four firms are enough to have optimal price competition, won't these same four firms also insure optimal non-price competition? If so, is there a reason to not just use a price standard? Won't a price focus automatically give us optimal non-price competition as well?

Normally, it would indeed. Normally there is no difference between a choice approach and a price approach and therefore little benefit to using a choice standard.[215]

But at other times the choice approach would make a significant difference in both the analysis and the result. The remainder of this section will analyze specific cases and categories of cases where a choice analysis would make a significant difference and where the choice analysis and result would be superior.

#### 1. Cases in Markets with Little or No Price Competition

The first category of cases involves conduct in markets with little or no price competition. This could occur as a result of regulation, of industry wide joint ventures, or third-party payers. In these situations there is no way to properly assess consumer welfare without focusing explicitly on non-price issues.

An example from the United States involves airlines back when their prices were regulated. During this period, airlines still competed in terms of service.[216] Suppose that every U.S. airline had wanted to merge during this period. Why not allow these mergers? Prices were regulated and could not increase. Moreover, there might have been efficiencies from the mergers. The reason the airlines were not allowed to merge is that we wanted these airlines to engage in non-price competition, specifically, in service competition.

In fact, similar mergers were allowed on these grounds involving the market for taxicabs in Montgomery County, Maryland, an area very close to Washington, D.C. The local regulators allowed every major taxicab company to merge because their prices were regulated.[217] How could there possibly have been any harm from these mergers? As one could predict, the quality of taxicab service went down significantly because the mergers created a near monopoly. Consumers suffered a harm that could not be picked up by a price or cost savings analysis.

Another important example is the FTC's recent *Realcomp II* case.[218] This involved a conspiracy among established full-service, high-priced real estate brokers to eliminate real estate brokers that provided only some

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215. Even for these situations, however, the consumer choice terminology is a better way of explaining the benefits of antitrust law to a lay audience or to judges than a price or efficiency approach.

216. *See* Averitt & Lande, *supra* note 10, at 196–97.

217. *Id.* at 233–35.

218. *In re* Realcomp II, Ltd., No. 9320, 2009 WL 6936319 (F.T.C. Oct. 30, 2009), *petition for review denied,* 635 F.3d 815 (6th Cir.), *cert denied,* 132 S. Ct. 400 (2011).

specific brokerage services, but did so for a much lower price. The FTC and the reviewing court held that consumers were entitled to have the low-cost, low-service option. It was not acceptable for the real estate broker cartel to only provide the full-service, high-cost option. Even though there was no evidence that the price of any real estate service increased, the court held that the conspiracy to eliminate choices from the marketplace violated the FTC Act.[219]

#### 2. Conduct That Impairs Consumers' Decision-Making Ability

A second category of cases when a consumer choice approach is superior involves conduct that increases consumers' search costs or otherwise impairs their decision-making ability. This conduct causes consumers to obtain products or services less suited to their needs, in addition to producing higher prices. There are a large number of cases that have involved restrictions on advertising by lawyers, dentists, opticians, engineers, etc.

In each of these cases the prices of the services in question—legal, dental, optical, etc.—increased as a result of the advertising restrictions. This was, of course, the purpose of the restraints. In addition, the prohibitions against advertising also made it hard for consumers to choose the service that best suited their needs. Consumers were also harmed by their inability to select the engineer, lawyer, or optician that was optimal for them.

Efficiencies were claimed for all the practices. Naturally! Depending upon the case, the efficiencies were more believable or less believable.

Most of these advertising restrictions were evaluated under the rule of reason. This rule states that the negative effects of the restrictions—both the higher prices and the diminished consumer choice—should be balanced against the practices' efficiencies. The balance easily could come out differently if only the price effects were included on the negative side of the tradeoff. However, a tradeoff that also included the negative effects on consumer choice (resulting from consumers' inability to find the best lawyer, engineer, etc., for their purposes) would more accurately reflect the effects of the restrictions on consumer welfare.

Another notable consumer search cost case, *Detroit Auto Dealers Ass'n*,[220] involved a conspiracy by every automobile dealer in a large metropolitan area to essentially stay open for business only from nine to five on weekdays.[221] This led to higher prices for automobiles. The decreased shopping time also caused consumers to purchase cars less suitable for their needs.

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219. *Id*. at *44.

220. *In re* Detroit Auto Dealers Ass'n, 111 F.T.C. 417 (1989).

221. There were, however, exceptions to this prohibition. For an analysis of this case, see Averitt & Lande, *supra* note 10, at 200–01.

In *Detroit Auto Dealers*—or in any of the vast majority of consumers' search cost cases that are decided under the rule of reason—the non-price harms to consumers should also be included, in addition to the price harms. Their combination should be weighed against any efficiencies from the practices. In practice, adding the non-price harms often could make a crucial difference in the outcome.

### 3. Markets Where Firms Primarily Compete Through Choice Competition

The final category of cases involves markets in which firms compete primarily through independent product development, quality, variety, and creativity, rather than through price. Effective competition in these industries may sometimes require more independent centers of decision making than are required to ensure price competition. Market concentration principles taken from a price context may not ensure robust competition in the ways that are most important to consumers. In these cases we care about artificially diminished consumer choice—even if prices are competitive. For this reason, in these markets a price standard is simply inadequate.

The media surely is an area where we care a lot about independent judgment, independent decision making, and creativity. It is possible to further analyze examples from this industry by contrasting them to a more conventional example of a merger of cookie companies. Suppose there were only four firms that made cookies, that two of them wanted to merge, and that three firms would be enough to yield effective price competition. If consumers want 20 or 200 different types of cookies, the remaining three firms would supply them. For this hypothetical four-to-three merger there would be no advantage to using a choice standard over a price standard or an efficiency standard. The reason is that the owners of the cookie companies do not care which cookies their customers eat, so they will produce whatever kinds of cookies that consumers desire.

But this might not always apply in the media sector. The media owners might have distinct preferences concerning the editorial slant of the news. Within limits, they may be able to slant their content or coverage. Moreover, the media owners might have unconscious biases and presuppositions, so even if they have the best intentions they might not be able to supply the full range of views. While companies easily can make all different types of cookies, it is much more difficult to hold all sorts of different worldviews.

Another area with special choice concerns is high technology, where innovation is especially crucial. It is virtually meaningless to try to use a price standard to evaluate the effects of a merger or joint venture on future technology, since by definition that future technology does not yet exist. For cases in the defense, pharmaceutical, computer, or other high-tech sectors, to ensure the optimal level of future consumer choice we want divergent sources of current innovation. In other words, in some markets, competition in terms of consumer choice (in terms of innovation, ideas, quality, privacy and/or variety) can be even more important than competition in terms of price or cost savings.

There certainly have been high-tech cases where this concern with choices seems to have affected the analysis and the ultimate decision. For example, there have been mergers in the pharmaceutical industry where the FTC seemed to require one more firm to innovate than normally would have been required simply for price competition.[222] There have also been defense sector mergers where the U.S. Justice Department appears to have required, for the sake of optimal innovation, one more firm than usual.[223]

### *C. Implementation Issues*

Antitrust cannot consider adopting a goal unless it can be implemented in a relatively objective, predictable manner. How does the choice approach compare to the other possible goals by this criteria? What are the guiding principles for determining how much weight to give to significant decreases in consumer choice? How can we conduct the analysis relatively objectively?

Mergers might be the easiest place to discuss implementation issues.[224] As a practical matter, how would we implement these consumer choice concerns, especially in a sector like the media, high technology, entertainment, or fashion, where choice concerns might be especially important? In three possible ways:

> (1) As a tie-breaker or plus factor. If we were deciding the legality of a media merger, for example, and if we were just on the margin if we only considered price effects, choice considerations should cause us to challenge the merger.
>
> (2) As an implicit factor that would operate within the current structure of the Merger Guidelines and would, as an informal matter, give discretionary weight to non-price choice considerations in the enforcers' analysis. Suppose that for industries where price competition was most important, the enforcers would challenge twenty percent of above-Guideline mergers. But perhaps for those industries where consumer choice issues were especially crucial—for mergers involving sectors such as the media, entertainment, or fashion—the enforcers would block forty percent of above-Guideline mergers. To implement choice concerns this way, as an informal matter of the enforcers' discretion, the Herfindahl-Hirschman Index (HHI) levels in the Guidelines would not be changed. But the Guidelines would be enforced more vigorously whenever choice competition was especially important.
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> (3) Change the Merger Guidelines and make choice analysis a separate explicit factor in the merger review process. Under this approach, a

222. *See, e.g.*, *In re* Glaxo Wellcome P.L.C., 131 F.T.C. 56 (2001).
223. *See, e.g*, Verified Complaint at 1–4, United States v. Lockheed Martin Corp., No. 1:98CV00731 (D.D.C. Mar. 23, 1998), 1998 WL 35242728.
224. For a fuller discussion of these issues, see Averitt & Lande, *supra* note 10, at 243–48.

> merger should be challenged either if it was likely to lead to higher prices, or if it was likely to lead to significantly less consumer choice because the merger was likely to lead to less innovation (the most important factor that determines consumer choice in the long run).

The merger investigation would make a separate, high-priority inquiry into both the price and the innovation effects of the merger. This inquiry could lead to a different result from a price-based inquiry, especially because not every company within an industry competes substantially through innovation. Some firms instead largely compete by making existing products less expensively, by superior marketing, by superior service, etc. This would be somewhat different from attempting to predict whether a particular merger would lead to more or to less innovation. Rather, it would mean attempting to ascertain whether particular firms historically had been centers of independent innovation.

Here is how this inquiry could work. Suppose that a high tech industry consists of five firms: firms *A*, *B*, *C*, *D*, and *E*. Suppose we also believe that three firms are enough to have effective price competition, and also that three firms is enough for effective innovation competition. But suppose that only firms *A*, *B*, and *C* compete significantly by innovating, that only these three firms have large R & D budgets, and that only these three have a history of making significant innovations. Suppose that Firm *D* competes in other ways—perhaps it is an imitator that makes existing products less expensively, and suppose that firm *E* historically only competes through superior marketing.

Suppose that firms *A* and *B* (two of the firms that compete by innovating) want to merge. Under price analysis we should permit this merger. This is because after the merger there would still be four firms left, and we have stipulated that three is enough for effective price competition. But under choice analysis we should block this merger because it is likely to lead to less innovation, the long term source of optimal consumer choice.

Accordingly, regardless of the number of firms we believe is necessary for effective price competition, and even if we believe that the same number of firms will suffice for choice competition in every industry, choice analysis sometimes could lead to tougher merger enforcement.[225]

### *D. An Example of the Increasing Use of Choice Analysis: The Evolution of the U.S. Merger Guidelines*

A striking and encouraging example of the increasing role of consumer choice analysis in U.S. antitrust law can be found by observing the increased importance of this subject in the Merger Guidelines. The 1992 edition barely mentions non-price competition. An introductory section

225. This is analogous to unilateral effects analysis, which essentially says that we should be especially tough on a merger between two firms that make products within the same niche of a relevant market, and more lenient toward mergers between producers of products that are not similar to each other. Choice analysis arguably could be said to create a "submarket" consisting of innovators or an "innovation market" within the overall market.

titled "Purpose and Underlying Policy Assumptions of the Guidelines,"[226] contains a dozen references in the text to "price," the "transfer of wealth from buyers to sellers," and similar monetary concepts.[227] Only a single footnote suggests that merger policy includes non-price concerns.[228]

The 1992 Merger Guidelines thus technically permit consideration of non-price elements of competition, but the document is structured in such a way as not to particularly encourage this analysis. It is possible that non-price competition might have been intended to be captured in the Guidelines' use of the term "price" which could have been meant to be used in the manner that economists often use this term: price that has been adjusted for quality, or "price" as a shorthand for both price and non-price attributes. The Guidelines did not, however, state this. Regardless, the 1992 Guidelines were not structured to encourage this approach or to suggest that choice considerations were a high priority.

By contrast, the 2010 Merger Guidelines have warmly embraced a consumer choice approach: section 1, the Overview, after noting that mergers can have price effects, states:

> Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.[229]

Moreover, the 2010 Guidelines contain a new section, section 6.4, titled "Innovation and Product Variety":

> Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an

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226. U.S. DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 0.1 (1992).

227. *Id.*

228. Footnote 6 of the 1992 Merger Guidelines reads: "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." *Id.* § 0.1 n.6.

The 1987 National Association of State Attorneys General (NAAG) Horizontal Merger Guidelines reflected a similar emphasis. It states in a footnote that consumers can be harmed by oligopoly behavior "on terms of trade other than price . . . ." NAAG HORIZONTAL MERGER GUIDELINES § 2.11 (1987), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,405, at 21,186 n.17. The footnote then elaborates this consideration at somewhat more length than the federal guidelines. It reads in full as follows: "Tacit or active collusion on terms of trade other than price also produces wealth transfer effects. This would include, for example, an agreement to eliminate rivalry on service features or to limit the choices otherwise available to consumers." *Id.* Then the NAAG merger Guidelines declare, more fundamentally, that the "central purpose" of merger law "is to prevent firms from attaining market or monopoly power, because firms possessing such power can raise prices to consumers above competitive levels . . . ." *Id.* at 21,185 (footnotes omitted).

229. U.S. DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 1 (2010).

> existing product-development effort or reduced incentive to initiate development of new products.[230]

This section also makes the importance of non-price competition clear:

> The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.
>
> If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger.[231]

Even the 2010 Merger Guidelines' Efficiencies section, which mostly is worded in cost terms, clearly makes non-price competition a high priority:

> [A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's

230. *Id*. § 6.4. The Guidelines continue:

> The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.
>
> The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together complementary capabilities that cannot be otherwise combined or for some other merger-specific reason.

*Id.* § 6.4.

231. *Id*. The Guidelines continue with an illustration:

> *Example 21*: Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

*Id*.

> ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products . . . .
>
> Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price . . . .
>
> When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing.[232]

The decisions embodied in the 2010 Merger Guidelines to make choice competition a vastly higher priority are a most welcome advance over the 1992 approach. Perhaps for the reasons given earlier in this article, the new Merger Guidelines recognize that a concern with price and efficiency often are insufficient and that the approach of the 1992 Merger Guidelines—mention non-price competition only in a footnote—is inadequate. Choice considerations are finally receiving the respect they are due.

### *E. Concluding Example: The* Microsoft *Case*

The final example was analyzed and decided under a consumer choice approach and could not have been analyzed well or decided correctly under a price or efficiency approach. This was the most highly publicized U.S. antitrust case of the last generation—the *Microsoft* case.[233]

The primary products in question were personal computer operating systems and browsers. The focus of the parties' briefs and the court decisions was on innovation, new products, and short term and long term consumer choice. In contrast, the briefs and decisions paid little attention to the price of anything. After all, the price of the operating systems was not an issue because Microsoft had a legal monopoly on it. The price of the browser was not an issue because Microsoft was giving it away for free (in fact, trying its best to give it to everyone for free). Nor were cost saving efficiencies a significant concern.[234]

Rather, short-term consumer choices, and also innovation and the resulting long term choices innovation could bring, were the key concerns. Naturally, both sides disagreed strongly about how to maximize consumer choice. But the important point is that consumer choice was—and should have been—the focus of the case. By contrast, cost savings and price were—and should have been—much lower concerns.[235]

The *Microsoft* case illustrates two important points. First, antitrust law has long been in the process of moving from an efficiency or price approach toward a choice approach, even if many cases do not explicitly use the

232. *Id*. § 10.

233. This analysis of Microsoft is based upon Robert H. Lande, *Consumer Choice As the Ultimate Goal of Antitrust*, 62 U. PITT L. REV. 503, 511–14 (2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478680; *see also* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

234. *See* Lande, *supra* note 233, at 511–14.

235. *Id*.

choice terminology. Second, a price or efficiency orientation often is inadequate to address many of our most important competition-related concerns.

Both *Microsoft* and the hypothetical involving the huge media merger presented at the beginning of this Article illustrate that the choice approach often will lead to a better analysis and a better outcome. The choice approach should be the normal way to analyze competition issues.

## IV. CONCLUSIONS: HONESTY AND TRANSPARENCY IN GOVERNMENT

It is interesting to contemplate some possible antitrust laws our country did not enact:

> (1) We could have prevented firms from entering into "any contract, combination, or conspiracy that is inefficient."
>
> (2) We could have prohibited, "inefficient methods of competition."
>
> (3) We could have prohibited mergers that may lessen competition or tend to create a monopoly, but added as an explicit exception, "unless that merger produces an efficient monopoly."
>
> (4) We could have made it illegal to monopolize or attempt to monopolize, and added an explicit exception for a monopoly attained by superior efficiency or historical accident.
>
> (5) We could have worded the antitrust statutes in price terms. We could have prohibited "monopoly pricing" and the "price effects of collusion," rather than using such general terms as restraints of "trade" and monopolization of "commerce," terms that suggests both price and non-price concerns.
>
> (6) If we had wanted to encourage those corporations existing when the Sherman Act was passed that were most efficient, we could have enacted a "protrust" law rather than an "antitrust law," whose preamble praised *Standard Oil* and the other trusts.

We never enacted any of efficiency-oriented laws. Nevertheless, the efficiency purist enforcer hypothesized at the beginning of this article could easily obfuscate or conceal what they were doing and enforce the existing laws in a manner that only maximized economic efficiency. Some previous real enforcement heads might well have done this. This would not, however, be a principled way to run a government. Government officials should be honest and transparent about the policies they are pursuing, and if the voters do not like this, they can elect new leaders.

To those who would implement an efficiency-only approach, I urge you to be proudly clear about what you are doing. Say candidly: "I think this merger will raise prices to consumers by 20 percent, and this cartel will raise prices by 300 percent. This means consumers will pay an additional $50 million to $100 million each year, all of which will enrich the monopoly and the cartel. That is fine with me because the merger and the collusion are net efficient." If, however, you would not proudly and clearly say these things, I submit that you should not embrace the efficiency approach to antitrust.

It is entirely understandable that many passionately wish the antitrust statutes' only goal was to enhance efficiency. Many consider this best for our economy, so they would like to interpret these laws in the ways they believe are optimal. This is understandable. But surely the Occupy Wall Street types would reason similarly if they ever got into power. Could a 1960s style "big is bad" approach ever return to antitrust? Or should we prevent this possibility by accurately adhering to the laws that Congress enacted?

It is difficult to believe that Congress in 1890 passed the Sherman Act because of its concern with the allocative inefficiency effects of supracompetitive pricing or that efficiency was Congress's sole goal in 1914 when it enacted the Clayton Act and the FTC Act. Rather, both a traditional examination of the legislative history of the antitrust laws and a textualist analysis of the antitrust statutes demonstrate the primacy of the wealth transfer concern. The antitrust statutes are supposed to prevent corporations from using their market power to force consumers to pay supracompetitive prices. We could politely call this a concern with the wealth transfer effects of market power. Or we could bluntly, but accurately, characterize these as situations where the firms are stealing from consumers.

To be complete, we should add that sometimes we have to focus explicitly on consumer choice (non-price) terms, sometimes we must take into account that the purchasers who need protection are businesses or indirect purchasers, and sometimes we should be concerned with protecting sellers from wealth transfers to powerful buyers with market power. But these are the exceptions. Usually, in fact, we can simply use a price approach to antitrust and remain faithful to Congress's wishes. Moreover, according to a textualist analysis, the Sherman Act contains no other exceptions. It prohibits all private monopoly, not just monopolies acquired by anticompetitive conduct.

As former Assistant Secretary of Defense John T. McNaughton once said, "An outside idea has a chance to influence government policy only if it has two characteristics. First, it can be stated in a simple declarative sentence. Second, once stated it is obviously true."[236] The "wealth transfer" or "preventing theft" articulation of the primary goal of antitrust qualifies on both counts. In addition, it is perhaps midway between what Tea Party adherents would desire and what the Occupy Wall Street protesters would settle for. It is also the best hope for U.S./European—indeed for worldwide—convergence around a single goal for competition policy. It has the best chance of constituting a compromise we could all accept.

236. *See* Emily Parker, *To Be Read by All Parties*, N.Y. TIMES, Feb. 19, 2012, at BR27.