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The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct

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THE ESSENCE OF ANTITRUST: PROTECTING CONSUMERS AND SMALL SUPPLIERS FROM ANTICOMPETITIVE CONDUCT

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The goals of antitrust law continue to be debated because there is no single goal that is unambiguously correct. There is one goal, however, that now commands wider support than any other: protecting consumers and small suppliers from anticompetitive conduct—conduct that creates market power, transfers wealth from consumers or small suppliers, and fails to provide them with compensating benefits. This goal is the predominant objective in the legislative histories, it is broadly supported by the American people, it is easier to administer than a total welfare standard, and it is now espoused by the majority of courts.

Proponents of total welfare advance two principal arguments, but neither warrants elevating it over consumer and small supplier protection. First, from a normative perspective, total welfare is arguably the superior goal because it considers the welfare of all participants in the economy, including producers and consumers outside the relevant market. It ignores, however, the transfer of wealth that anticompetitive conduct causes, a transfer that many people regard as exploitative and unfair. Second, from a legal perspective, total welfare is arguably the goal of section 2 of the Sherman Act, because it allows a firm to gain monopoly power through superior efficiency. But this safe harbor is equally consistent with a consumer protection goal, since it encourages firms to succeed in the marketplace by providing customers with better products, lower prices, and more choices.

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INTRODUCTION

Everyone is a consumer, and the most egregious form of anticompetitive behavior—hardcore price fixing—harms consumers without justification. It raises the prices they pay, transfers their wealth to the conspirators, and rarely, if ever, has redeeming virtues. The most basic purpose of antitrust law is to protect consumers from such behavior. A closely related goal is to protect small suppliers like farmers and ranchers from price fixing by large buyers. When buyers with market power agree to depress the prices they pay small, competitive suppliers, they exploit them in the same way that colluding sellers exploit consumers. They take the suppliers' wealth without providing them with countervailing benefits.

Price fixing, however, lies at the core of antitrust law and is easy to condemn from a variety of perspectives. Even if the ultimate objective of antitrust law were not to protect consumers and small suppliers from exploitation but to protect the economy from conduct that reduces the total wealth or satisfaction it generates, hardcore price fixing would still be condemned. By raising the prices that consumers pay or lowering the prices that suppliers receive, it depresses output, distorts resource allocation, and reduces aggregate welfare. Alternatively, if antitrust is ultimately directed at the concentration of power in society, price fixing would also be troubling because it increases the economic power of the conspirators.

Other forms of business behavior, however, are more difficult to evaluate and require choices among goals. A merger of competing sellers that results in somewhat higher prices but significantly lower production costs would harm consumers and increase the concentration of economic power, but it would also improve total welfare, since it would enhance productive efficiency more than it distorts allocative efficiency.[1] Similarly, a dominant firm that cuts prices to achieve greater economies of scale would benefit both consumers and economic efficiency in the short run. But in the long run, there may be a conflict between total welfare and the welfare of consumers. If the dominant firm gains a monopoly that does not erode quickly, consumers may be harmed on balance, but total welfare may rise because of the long-term decline in production costs.[2]

The debate about antitrust goals is a debate about how to evaluate such tradeoffs.[3] It is not possible to avoid this debate by resorting to the proposition that the purpose of antitrust is to preserve competition or protect the competitive process. Those terms are not self-defining, they were not defined by Congress,[4] and they cannot be used to evaluate behavior with mixed effects without specifying either the effect or effects that should count or the legal rules or standards that should be applied in making the determination—a decision that itself implies a judgment about which effects deserve the greatest weight or which behavior deserves condemnation. One way or another, the goals issue must be addressed.[5]

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1. *See infra* note 42 and accompanying text.

2. *See infra* note 133 and accompanying text; *see also* Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2474 (2013) (other practices that may present a conflict between consumer welfare and total welfare include "joint ventures with some integrative function, mergers, many unilateral practices, and at least a few vertical practices, including some instances of resale price maintenance, exclusive dealing, and tying. What these practices have in common is that under the right circumstances they can serve as an opportunity for exercising market power, but they can also produce considerable efficiencies.").

3. Many commentators have recognized the importance of these tradeoffs. *See, e.g.*, Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 354 n.26 (2011) ("It is widely accepted that the difference between the two views [total welfare and consumer welfare] is important in certain settings, such as mergers."); Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2210 (2013) ("[T]he choice between [purchaser welfare and total welfare] will have important implications for public and private enforcement, particularly when viewed through the lens of the optimal deterrence model."); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 133, 164 (2010) ("The differences between the total surplus standard and consumer-oriented standards are substantial.").

4. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 101 (rev. ed. 1997) ("The members of Congress who enacted the Sherman Act wanted to preserve 'competition,' although they never defined that term . . . ."). Nor did Congress define any of the other key terms in the principal antitrust laws, the Sherman Act and the Clayton Act, such as "restraint of trade" or "monopolize." Likewise, in the Federal Trade Commission Act, passed in the same year as the Clayton Act, Congress did not define "unfair methods of competition."

5. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 436–37 n.104 (2009) ("But what does the 'competitive process' mean? It cannot turn on whether the process involves more competitors or more competitive behavior among them, for antitrust law allows mergers that reduce the number of competitors and joint ventures that limit competitive behavior if they benefit consumer welfare . . . . Nor can it turn on a combination of those factors and conduct

The debate about antitrust goals persists because there is no unambiguously correct way to choose among them. As a purely normative matter, it is not obvious that consumer protection is a superior goal to economic efficiency—that the welfare of consumers must trump the welfare of society. Nor is it possible to read the legislative histories of the antitrust laws or the cases interpreting them and identify a single goal that must be pursued to the exclusion of all others. Nevertheless, it is possible to discern a dominant goal, a goal that has wider support than any other in the sources most often relied on—the legislative history, the case law, the preferences of the American people, and the ease of administration.

Those sources are worth examining despite the views of some Justices and scholars that legislative interpretation should be based exclusively on the original meaning of the statutory text.[6] In the case of the principal antitrust laws, the critical terms were not defined,[7] and Congress did not specify in the statutes or indicate in the legislative histories that courts were to give to these terms the meaning they had in the common law.[8] This does not imply that there is no value in looking at the words that Congress chose.[9] But it does suggest that a more reliable guide to what Congress wanted to achieve is contained in the legislative discussions and debates. The case law is also important because Congress expected the courts to play a major role in interpreting the broad terms it used in the antitrust laws.[10]

efficiency, for antitrust law . . . prohibits efficient mergers that reduce the number of rivals but harm consumer welfare. Instead, as this legal pattern shows, courts judge whether conduct worsens the competitive process by whether it produces a process that is likely to harm consumer welfare."); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 569 (2012) (the competitive process fails as an antitrust goal because "it simply shifts the debate to a larger, unresolved issue, namely defining an 'effective competitive process'").

6. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

7. *See supra* note 4.

8. To the contrary, Justice Scalia himself declared that "restraint of trade" was not to be given the meaning it had in the common law of 1890. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("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."); *id.* at 731 ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted."); *see also* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911) ("With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified . . . .").

9. Indeed, Professor Lande has found contemporaneous dictionaries, treatises, and cases that define or interpret the terms in the principal antitrust laws. While limited in number, these materials consistently indicate that Congress intended to prohibit behavior that reduced output, raised prices, or otherwise restricted consumer choice, without regard for whether it increased economic efficiency. "Monopolize," for example, meant to use conduct that resulted in monopoly power, even if the conduct simply reflected the firm's superior efficiency. *See* Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2376 (2013).

10. *See* United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) (in the Sherman Act, Congress had "delegated to the courts the duty of

Moreover, popular support is relevant because it provides the basis for the continued existence of the antitrust laws and the funding that makes antitrust enforcement possible. If the antitrust laws were consistently applied in ways that the public—and their congressional representatives—opposed, the funding for enforcement would be cut and the laws themselves amended or repealed. Finally, ease of administration needs to be considered because any antitrust goal must be implemented, and when implementation is more costly and complex, enforcement and litigation will be more expensive, business planning will be more difficult, and the value of antitrust as a deterrent—its most important value—will be reduced.

These sources of meaning indicate that the goal with the widest support—the most fundamental goal—is the protection of consumers from anticompetitive conduct—conduct that creates market power, transfers wealth from consumers to producers, and fails to provide consumers with compensating benefits. In a buy-side case, when suppliers are the victims of anticompetitive conduct, the overarching goal is analogous: to stop conduct that creates market power on the buying side, transfers wealth from suppliers to buyers, and does not provide suppliers with offsetting benefits.[11] In short, whether practiced by buyers or sellers, conduct that creates market power, transfers wealth, and fails to provide compensating benefits is conduct that reduces competition and distorts the competitive process.

The legislative histories of the principal antitrust laws express more support for this goal than for any other. Many senators and congressmen objected to price fixing and other forms of anticompetitive behavior because it exploited consumers or small suppliers. A number of representatives described this exploitation as a form of robbery or extortion, where the source of the coercion was not a gun or a club but market power. Never did a member of Congress indicate that such exploitation could be

fixing the standard for each case"); Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 225 (2006) ("The open-textured nature of the [Sherman] Act—not unlike a general principle of common law—vests the judiciary with considerable responsibility for interpretation . . . .").

11. In buy-side cases, the victims of anticompetitive conduct are often individual suppliers like farmers, ranchers, and timber owners—small suppliers who ordinarily lack market power and can be exploited by a buyer or group of buyers with monopsony power. As shown below, both the legislative history of the Sherman Act and the case law indicate that Congress wanted to protect such small suppliers from anticompetitive conduct. Of course, suppliers need not be individuals or small firms in order to be vulnerable to monopsonistic exploitation. They may be large firms so long as they compete intensely with each other and price approximately at marginal cost. If, instead, suppliers possess market power and price significantly above marginal cost, the analysis is more complicated. In that case, the suppliers—and consumers—may still be harmed by buyer power, but such power is not textbook monopsony power; it is countervailing power and its effects can be procompetitive or anticompetitive. For an analysis of the types of buyer power and their consequences, see generally John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485 (2012). For simplicity, this Article will focus on the concern most evident in the legislative history and case law: protecting small, powerless suppliers from exploitation by buyers with monopsony power.

excused by an increase in economic efficiency—that a combination of competitors that resulted in higher prices could be justified if it achieved a significant reduction in production costs. At the same time, Congress wanted to protect firms that succeeded in the marketplace by offering better products or, through their superior efficiency, lower prices. This solicitude for superior performance—for competition on the merits—also suggests a focus on the interests of consumers, since firms succeed in the marketplace by offering consumers what they want.

In recent years, the case law has largely adopted the same focus. While earlier decisions expressed support for other goals, including preserving unconcentrated market structures and promoting economic efficiency, by the 1990s most courts had embraced consumer protection and, in buy-side cases, small supplier protection. Today, as Part I.B explains, when judges address the goals of the antitrust laws in a sell-side case or define critical terms like "anticompetitive," they ordinarily say that their aim is to prevent injury to consumers, not to enhance total welfare. More importantly, when they address a conflict between these two goals, they always choose consumers. No court has allowed behavior found likely to harm consumers in the relevant market on the ground that it would enhance economic efficiency. Concern with the overall concentration of power in the economy or with the preservation of small business has almost entirely disappeared.[12]

12. In one area of antitrust law, secondary line Robinson-Patman Act enforcement, the protection of small business remains the principal goal. *See* John B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has* Volvo *Reconciled Them?* 30 SEATTLE U. L. REV. 349, 349–51 (2007). In primary line Robinson-Patman cases—cases in which the plaintiff is a *competitor* of the discriminating seller—the Supreme Court has insisted that the plaintiff show injury to market-wide competition. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993). But in secondary line cases—cases in which the plaintiff is a *customer* of the discriminating seller—the Court has retained the traditional requirements for proving competitive injury. In essence, these requirements allow a plaintiff to establish competitive injury by showing that the sellers' discrimination conferred an advantage on another customer that enabled it, when competing for the business of downstream purchasers, to take substantial sales or profits from the plaintiff. *See* Kirkwood, *supra*, at 349–50 & n.4. In its most recent Robinson-Patman case, *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), the Court reiterated these requirements. *See id.* at 177. It ruled for the defendant because the plaintiff could not satisfy them. *See id.* at 180 (finding that the plaintiff "did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial").

The Court also rejected the plaintiff's attempt to broaden the reach of the Act. The Court made clear, as it had before, that it would not adopt a new, more expansive interpretation of the Act unless that interpretation promoted market-wide competition. *See id.* at 180–81; Kirkwood, *supra*, at 372–74. Since Volvo's conduct involved "selective price discounting" that "fosters competition among suppliers of different brands," the Court would not adopt a construction of the Act that condemned it. *Volvo*, 546 U.S. at 181 Thus, when the Court turned to market-wide competition, it focused on the impact of Volvo's behavior on customers, not competitors, a focus that is now typical of recent judicial opinions under the other antitrust laws. *See infra* Part I.B. But when the Court laid out the traditional prerequisites to secondary line liability, it reaffirmed the protectionist thrust of the Act.

Popular support for antitrust enforcement rests on the same basis. Everyone in the country is a consumer and no one likes to pay artificially high prices for goods and services. Moreover, even when they are not the victims, many people think that such exploitation is wrong. According to survey data, large majorities believe it is unfair for a firm to take advantage of unearned market power to impose losses on its customers. People who hold this belief would want a legal system that protected consumers from illegitimate market power—market power that did not provide them with offsetting benefits. It is also understandable that most people would be more concerned about anticompetitive exploitation than economic inefficiency, since the transfer of wealth caused by supracompetitive pricing is typically much greater than the resulting allocative inefficiency or deadweight loss.[13] Finally, there is apparently no evidence that the American people would approve of a merger that raised prices so long as it increased economic efficiency.[14]

It is also easier to administer the antitrust laws if their overarching goal in a sell-side case is consumer protection rather than total welfare. Consumer interests vary, of course, and it is not always easy to determine the overall impact of a practice on consumers. But whatever the difficulties, they are less than the problems presented by a total welfare standard, which requires assessing the effects of a practice on both consumers and producers, and

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That thrust has brought the Robinson-Patman Act into considerable disfavor. *See, e.g.*, *Volvo*, 546 U.S. at 187 (Stevens, J., dissenting) (stating that the mission of the Act "may well merit Judge Bork's characterization as 'wholly mistaken economic theory'" (citing ROBERT BORK, THE ANTITRUST PARADOX 382 (1978))). As a result, the Federal Trade Commission, once the prime enforcer of the Act, has almost entirely abandoned the field. *See* David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2170–71 (2013). Because the Act is now plainly outside the mainstream of antitrust law, it will not be discussed further in this Article.

13. In the case of cartels, for example, Connor and Lande estimate, based on a large sample and an extensive literature review, that the transfer is many times greater than the deadweight loss. John M. Connor & Robert H. Lande, *Cartels As Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 459 (2012) ("[T]he allocative inefficiency associated with cartelization is between $3 and $20 for every $100 in cartel overcharges . . . .").

14. If there were support for such consumer-harming but efficiency-enhancing combinations, stories like this might appear in the *The Wall Street Journal*:

> The FTC announced today that it will not challenge a proposed joint venture of the only five producers of type-ZZ insulin. A study by the Commission's Bureau of Economics found that the joint venture will enable the producers to reduce their manufacturing costs by 1%. The study further found that the producers plan to increase the price of type-ZZ insulin by 300%. However, in the opinion of the Commission's economists, this price increase will not reduce the overall usage of type-ZZ insulin significantly. Therefore, the Commission concluded, society as a whole will be better off by permitting the joint venture. The stockholders of the drug companies in the venture will gain more than vaccine customers will lose. In the Commission's view, Section 5 of the FTC Act should not be used to prevent such efficient joint ventures despite these large price increases.

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, 340–41 n.14 (2010).

evaluating the net impact. To be sure, when a bright line rule can be applied, ultimate goals do not affect the administrability of the law. But bright line rules are not always appropriate, and when courts and agencies must instead assess the impact of a practice in order to determine its legality, the task is likely to be simpler and less costly when the ultimate question is the impact on consumers in the relevant market rather than on economic efficiency.[15]

In sum, there is widespread support for the view that the fundamental goal of antitrust is consumer protection in a sell-side case and small supplier protection in a buy-side case. Those who believe that the preeminent goal should instead be total welfare advance two principal arguments. First, they assert, total welfare is a superior normative goal. After all, total welfare measures the welfare of the entire society, not just a component of it, and if total welfare improves, then, in principle, all the components of it, including consumers, can be made better off. In practice, however, consumers who pay higher prices as a result of anticompetitive conduct are not compensated by the producers who gain from it. Moreover, as just noted, many people object to behavior that exploits consumers or small suppliers without providing them with offsetting benefits. This desire to protect consumers and small suppliers from anticompetitive conduct is itself an element of total welfare, since it represents a "taste" or preference for fairness. But it also represents an independent normative judgment about the kind of society that many people want to have.

The second objection follows from the basic antitrust principle that a firm may gain monopoly power through superior efficiency. This principle, reflected in the legislative history and adopted by the cases, would allow a firm with a cost advantage to drive out all of its rivals and then charge monopoly prices for a substantial period of time, a result that may increase total welfare but reduce the welfare of consumers. Some have argued from this possibility, as well as from other considerations, that the purpose of section 2 of the Sherman Act, unlike the purpose of section 1, is to promote

15. As Part I.C explains, when the seller does not deal directly with final consumers, the focus of the inquiry ought to be on consumers in the relevant market (direct purchasers), not final consumers, even if the direct purchasers are businesses. Impact on direct purchasers is both easier to assess and a reasonable proxy for impact on final consumers. If direct purchasers face an unjustified price increase, final consumers are likely to be hurt as well. Some cases implicitly recognize this, phrasing the goal of antitrust in terms of protecting customers, purchasers, or buyers rather than consumers. *See* Associated Gen. Contractors of Cal., Inc. v. Cal. 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."); *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 . . . ." (quoting *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 651 (E.D. Mich. 2000))); *see also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) ("As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.").

total welfare.[16] One can explain the safe harbor for superior performance, however, without concluding that Congress adopted a different goal in section 2. This safe harbor also serves consumer interests—by creating incentives to develop cheaper production processes or better products, thereby enabling firms to lower prices or expand consumer choice—and courts have increasingly justified the safe harbor on this ground. While the safe harbor may not always promote consumer interests, it is likely to do so most of the time, and there is no obvious legal principle that would better serve consumers.[17]

In Part I of this Article, I describe the support for the view that the preeminent goal of antitrust law is protecting consumers and small suppliers from anticompetitive conduct. In Part II, I examine a number of objections to this approach.

I. SUPPORT FOR CONSUMER AND SMALL SUPPLIER PROTECTION

Protecting consumers from anticompetitive conduct—conduct that creates market power, transfers wealth, and fails to provide compensating benefits—is the antitrust goal with the widest support. It is the predominant goal in the legislative histories of the principal antitrust laws, it is the objective that is most often endorsed by courts today, it best explains the current popular and political backing for antitrust enforcement, and it is easier to administer than total welfare. In buy-side cases, the parallel goal—protecting small suppliers from anticompetitive conduct—also has the most support, although since buy-side cases are much less common than sell-side cases, it has received considerably less attention.

A. Legislative History

Many authors have reviewed the legislative histories of the principal antitrust laws, the Sherman Act and the Clayton Act, or the historical context in which these laws were enacted.[18] These inquiries have shown that Congress did not have a single objective in mind when it passed the major antitrust laws. The members of Congress who advocated antitrust

16. *See generally* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010).

17. As the reference to consumer choice indicates, the nonprice dimensions of competition may be at least as important in particular markets as the price dimensions. For articles emphasizing this point, see, for example, Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007); Lande, *supra* note 9.

18. For citations to nineteen of these studies, as well as to the legislative histories themselves, see 1 AREEDA & HOVENKAMP, *supra* note 4, ¶ 101 n.1. The best known reviews are Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982), and ROBERT BORK, THE ANTITRUST PARADOX (1978), which is based on but ultimately diverges from, Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966), as I note below.

legislation did so in order to advance a range of goals, from curbing the political and social power of the trusts to encouraging firms to develop better products. One objective, however, predominated over all the others: protecting consumers from overcharges—the higher prices made possible by anticompetitive conduct. As numerous scholars have recognized, Congress's fundamental goal was to prevent firms from gaining market power through anticompetitive means—combining rivals into trusts, for example, or driving out competitors through predation—and then using that power to charge higher prices, transferring wealth from consumers to the perpetrators of the conduct.[19] Congress also intended to stop buyers from engaging in similar anticompetitive behavior in order to exploit small sellers like farmers and ranchers.[20]

Senator Sherman, for example, called overcharges "extortion which makes the people poor" and "extorted wealth."[21] He stated:

> The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests. . . . Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. . . . Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced . . . .[22]

19. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2 (2005) ("[The] only articulated goal of the antitrust laws is to benefit consumers."); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 50 (3d ed. 2005) ("[T]he primary intent of the Sherman Act's framer was . . . the distributive goal of preventing monopolists from transferring wealth away from consumers."); *id.* at 76 ("[T]he legislative history of the Sherman Act shows a great deal of concern for the fact that monopolists transfer wealth away from consumers, but no concern at all for any articulated concept of efficiency."); Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983) ("The perfectly discriminating cartel is taking from some people and giving to other people more than competition would. I regard this as an anticompetitive distortion. 'Consumer welfare' embraces what individual consumers are entitled to expect from a competitive economy. If the efficiency extremists insist that only their definition of consumer welfare is recognized by economists, we would answer that ours is clearly recognized by the statutes. The legislative history of the Sherman Act is not clear on much, but it is clear on this."); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702–03 (1986) (noting that when Senator Sherman and others "protested the Sugar Trust and other malefactors," their principal concern was high consumer prices and that the "choice they saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges."); Elhauge, *supra* note 5, at 437 ("The legislative history . . . indicates that Congress wanted to protect consumer welfare."); *id.* at 436 ("[A]ntitrust law clearly protects [consumer welfare rather than total welfare] when the two are in conflict.").

20. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 714 (2007) ("Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions.").

21. 21 CONG. REC. 2461 (1890).

22. *Id*. at 2457.

Representative Heard condemned the trusts for the same reason:

> We know that by such means the trusts which control the markets on sugar, nails, oils, lead, and almost every other article of use in the commerce of this country have advanced the cost of such articles to every consumer, and that without rendering the slightest equivalent therefor these illegal conspiracies against honest trade have stolen untold millions from the people.[23]

Congressman Fithian endorsed the view of a constituent that the trusts were "impoverishing" the people through "robbery."[24] Senator George declared: "They aggregate to themselves great, enormous wealth by extortion which make [sic] the people poor."[25]

Likewise, Congress objected when the trusts used their power against upstream suppliers, depressing input prices below competitive levels and transferring wealth from powerless price takers to combinations of competitors. Senator Sherman stated:

> They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.[26]

The beef trust was a repeated target of criticism. Senator Allison noted that "there is a combination in the city of Chicago which not only keeps down the price of cattle upon the hoof, but also . . . make[s] the consumers of beef pay a high price for that article."[27] Representative Taylor asserted: "The beef trust fixes arbitrarily the daily price of cattle. . . . The farmers get from one-third to half of the former value of their cattle and yet beef is as costly as ever. . . . This monster robs the farmer on the one hand and the consumer on the other."[28] The Senate appointed a special committee to investigate the beef trust and its report endorsed the Sherman Act.[29]

In statements like these, members of Congress consistently condemned price fixing by the trusts, not because it distorted resource allocation or reduced total welfare but because it exploited consumers or small suppliers. Congress's preference for consumers over economic efficiency was also apparent in the few instances in which senators or representatives focused

23. *Id*. at 4101.
24. *Id*. at 4103.
25. *Id*. at 1768.
26. *Id*. at 2461 (statement of Sen. George) (internal quotation marks omitted).
27. *Id*. at 2470.
28. *Id*. at 4098.
29. *See* Werden, *supra* note 20, at 715–16; *see also* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 321 (2012) ("A key political force behind antitrust and the move to impose federal regulation of industry was . . . the farm vote. . . . Indeed, nearly all the fifty-nine petitions that concerned trusts sent to Congress prior to the enactment of the Sherman Act came from farming states and emanated from organizations such as the Farmers' Union, Farmers' Alliance, Farmers' Mutual Benefit Association, and Patrons of Animal Husbandry.").

on behavior that might present tradeoffs between the two values. The most important is the following statement by Senator Sherman: "It is sometimes said of these combinations 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."[30] This statement suggests that Sherman did not approve of horizontal combinations, even when they lowered production costs and raised total welfare, unless they passed on those savings to consumers. As Professors Areeda and Hovenkamp note, Sherman "placed greater value on lower consumer prices than on economic efficiency generally."[31] Others in Congress resolved the tradeoff in the same way: "The members of Congress who spoke on the question believed that combinations that lowered the costs of production but that also decreased output or increased prices should be condemned."[32]

Bork himself came to the same conclusion in his original analysis of the legislative history. He stated that Congress's opposition to combinations that created monopoly power "derived in large measure from a desire to protect consumers from monopoly extortion. . . . Where producer and consumer welfare might come into conflict . . . Congress chose consumer welfare as decisive."[33] As a result, Bork declared: "The touchstone of illegality is raising prices to consumers. There were no exceptions."[34] In his subsequent book, *The Antitrust Paradox*, Bork redefined "consumer welfare" as "total welfare," but the evidence he set forth showed that Congress had in fact adopted a true consumer welfare standard.[35] Later, in discussing the proposed Clayton Act, Senator Thompson endorsed the same "touchstone" for evaluating conduct that Bork had discerned in the earlier legislative history. Thompson stated: "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."[36] The ultimate aim of the antitrust laws, in short,

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30. 21 CONG. REC. 2460.

31. 1 AREEDA & HOVENKAMP, *supra* note 4, ¶ 103a.

32. *Id.* ¶ 101.

33. Bork, *supra* note 18, at 11.

34. *Id.* at 16.

35. *See* Elhauge, *supra* note 5, at 437–38 ("[W]hat [Bork] actually showed for the first 109 pages of his famous book was that the antitrust laws embody a 'consumer welfare' standard, which on page 110 he converted into a total welfare standard with the logic that 'the monopoly and its owners . . . are also consumers,' so that conduct that provides benefits to a monopolist that exceed the harm to traditional consumers is 'merely a shift in income between two classes of consumers.' Bork offered no evidence that Congress ever shared his rather specialized understanding of what a 'consumer' meant." (quoting BORK, *supra* note 18, at 110)); *see also* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 250 (1985) ("Bork's work has been called into question by subsequent scholarship showing that . . . Congress had no real concept of efficiency and was really concerned with protecting consumers from unfavorable wealth transfers."); Orbach, *supra* note 3, at 136 ("Bork was 'confused' when he used the term 'consumer welfare.'").

36. 51 CONG. REC. 14,223 (1914).

is to stop conduct that exploits consumers while allowing behavior that benefits them.

Senator Hoar's famous description of what constitutes monopolizing conduct is consistent with this test, though it does not explicitly endorse it. The key passage in the legislative history is this:

> MR. KENNA: 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 Unites 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?
>
> . . . .
>
> MR. HOAR: [T]he word "monopoly" is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him. . . .
>
> I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that 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, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.[37]

For Senator Hoar, the standard for determining whether a businessman has obtained an illegal monopoly is whether he used "means which prevent other men from engaging in fair competition with him."[38] Hoar did not define "fair competition" and did not link it to either consumer welfare or total welfare, but the examples he gave of behavior that would and would not constitute monopolization suggest that he was more concerned about consumers than economic efficiency.

According to Hoar, a businessman who prevailed in the marketplace "because nobody could do it as well as he could was not a monopolist."[39] This safe harbor for superior performance serves consumer interests, for it encourages firms to gain market share by offering consumers the best possible products, prices, and service. A firm that attains a monopoly by inventing a more appealing product plainly benefits its customers. A firm that uses more efficient production methods or greater economies of scale to acquire a monopoly also benefits its customers because, in order to increase its market share, it passes on its cost advantages in the form of lower prices or higher quality. To be sure, acquiring a monopoly through superior efficiency could harm consumers in the long run if the resulting

37. 21 CONG. REC. 3151–52 (1890).
38. *Id.* at 3152.
39. *Id.*

monopoly power imposed losses on them that outweighed the gains they realized when the firm was outcompeting its rivals. But this would occur only if the monopoly was sufficiently large and long lasting. If instead the supracompetitive pricing was limited in size and duration, consumers would be better off in the long run. As explained below, a safe harbor for superior performance probably benefits consumers.[40]

Hoar's second example is not only consistent with a consumer protection goal, it suggests that consumer interests should trump economic efficiency. Hoar stated that "the buying up of all other persons engaged in the same business"[41] would constitute monopolization. Such conduct is very likely to harm consumers, at least for some time and to some degree. But it could also increase total welfare if the combination of competitors lowered production costs significantly.[42] Yet Hoar made no exception for such cases, suggesting that if he had been asked to resolve a conflict between consumers and economic efficiency, he would have chosen consumers.[43]

In short, the predominant goal expressed in the legislative histories of the Sherman Act and the Clayton Act is the protection of consumers and small suppliers from anticompetitive conduct. Congress recognized that combinations of competitors and single-firm exclusionary behavior could produce efficiency gains and, in sell-side cases, Congress wanted to encourage those gains to the extent they benefited consumers. But to the extent conduct presented a tradeoff between consumer protection and efficiency, the congressmen who addressed the issue always resolved the tradeoff in favor of consumers. While Congress may have felt considerable political pressure from small firms concerned about losing business to

40. The answer depends, narrowly, on the definition of superior performance and, more broadly, on whether there is an alternative legal standard that would better serve consumers. As Part II.B indicates, the most obvious alternative—a case-by-case determination of the long-term net impact of the defendant's conduct on consumers—is almost certainly not preferable, since it would be more expensive to administer and is likely to result in overdeterrence of desirable conduct. But Senator Hoar did not get into these details. He articulated a broad safe harbor for superior performance, he framed it in terms of fairness, not welfare, and he illustrated it with examples that are more consistent with a consumer protection standard than a total welfare standard. *Id.*

41. 21 CONG. REC. 3152.

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

43. For Senator Edmunds, the only other senator who responded to Senator Kenna, the sole issue was whether the conduct in question resulted in a monopoly. It did not matter whether the conduct might have promoted efficiency. Relying on a dictionary, Edmunds stated that "to monopolize" meant simply to "purchase or obtain possession of the whole of" or to "engross or obtain by any means the exclusive right of." 21 CONG. REC. 3152. In Kenna's hypothetical, this test was not met, according to Edmunds, since the man who won the contract has "not got the possession of all the horned cattle in the United States." *Id*. But if he had, he would have violated section 2. In Edmunds's view, what matters is the result—monopoly—not the means of obtaining it.

larger, more efficient rivals,[44] the members who supported the Sherman Act almost never advocated it on these grounds.[45] The public interest they identified was not the interest in protecting small business from competition, but the interest in protecting consumers and small suppliers from exploitation. This same theme appears as the overarching objective of the other principal antitrust laws as well.[46] In recent years, the case law has also largely adopted this perspective.

B. The Case Law

In the 1960s, the Supreme Court gave considerable prominence to noneconomic values, particularly in its merger decisions, emphasizing that Congress wanted to preserve unconcentrated market structures even if consumers had to pay higher prices.[47] By the late 1970s, however, the Court had embraced an economic approach to antitrust law, and several of its opinions described the purpose of antitrust or the nature of anticompetitive and procompetitive conduct in economic terms.[48] Most notably, in *Reiter v. Sonotone Corp.*,[49] the Court, citing Bork, announced that the legislative history suggests that the Sherman Act is a "consumer welfare prescription."[50] While the Court did not address whether it equated consumer welfare with total welfare, as Bork had, or whether it was using the term in its natural sense to refer to the welfare of consumers, its reference to Bork and its frequent resort to economic analysis led to a new

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44. *See* 1 AREEDA & HOVENKAMP, *supra* note 4, ¶ 101 ("[T]he interest groups that communicated their concerns to Congress most effectively were small producers, whose injuries flowed mainly from the lower costs of larger, more efficient rivals.").

45. *See* Lande, *supra* note 18, at 103 n.149 ("Only Representative Mason expressed an intent to protect small businesses at the expense of consumers.").

46. *See id*. at 106–26, 130–42 (analyzing the legislative histories of the Federal Trade Commission Act and the Celler-Kefauver Act, which amended the Clayton Act).

47. In the best-known example, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Court stated:

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

Id. at 344.

48. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the case that unmistakably signaled the change, the Court overruled its per se ban on nonprice vertical restraints and declared that per se rules must be based on "demonstrable economic effect." *Id*. at 59. Professor Muris called the opinion a "ringing endorsement of the economic approach to antitrust [law]." Timothy J. Muris, GTE Sylvania *and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 900 (2001). In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the Court referred explicitly to economic efficiency, indicating that per se condemnation was inappropriate for conduct "designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id*. at 20 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

49. 442 U.S. 330 (1979).

50. *Id*. at 343 (citing BORK, *supra* note 18, at 66).

emphasis on economic efficiency, both in its own opinions and in lower court opinions, especially in the Seventh Circuit.[51]

In 1982, Robert Lande published his analysis of the legislative histories of the principal antitrust laws, concluding that Congress's overarching purpose was not promoting economic efficiency but "preventing 'unfair' transfers of wealth from consumers to firms with market power."[52] This article changed the terms of the debate. The critical issue was no longer economic v. noneconomic values (efficiency v. populism) but which economic value should be dominant, consumer protection or economic efficiency. Given the strength of Lande's legislative history analysis, the appeal of consumer protection as a normative goal and the ease of administering a legal system with a single target in sell-side cases—consumer impact—and a parallel target in buy-side cases, the case law has gradually but unmistakably embraced this goal. While it is not the universal view, in the last two decades it has become the majority view.

In 2008, Professor Lande and I documented this shift. We surveyed judicial decisions issued in the prior fifteen years and concluded that when judges referred to the ultimate goal of antitrust or defined a key term like "anticompetitive," they most often indicated that the fundamental objective is the protection of consumers in sell-side cases and the protection of small suppliers in buy-side cases.[53] Two Supreme Court cases were particularly revealing. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[54] the Court indicated that the purpose of the rule of reason is to determine the effect of a practice on consumers. Indeed, the Court expressly equated anticompetitive effect with harm to consumers and procompetitive effect with benefit to consumers.[55] In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[56] the Court identified the "traditional concern" of the antitrust laws as "consumer welfare and price competition"[57] and made clear that consumer welfare referred to the welfare of consumers in the relevant market, not economic efficiency. In explaining why unsuccessful

51. *See* Ginsburg, *supra* note 10 (discussing Supreme Court cases from the late 1970s to the mid-1980s); *see also* Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency."); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) ("[T]he emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency . . . .").

52. Lande, *supra* note 18, at 68; *see also id.* at 68–69 ("Congress intended to subordinate all other concerns to the basic purpose of preventing firms with market power from directly harming consumers.").

53. *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211–36 (2008) (collecting and analyzing recent cases).

54. 551 U.S. 877 (2007).

55. *Id.* at 894–95. The rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at 886.

56. 509 U.S. 209 (1993).

57. *Id.* at 221.

predation should not be condemned, even though it may cause allocative inefficiency, the Court pointed out that it "produces lower aggregate prices in the market, and consumer welfare is enhanced."[58] Thus, in *Brooke Group*, the Court measured consumer welfare by the level of prices in the market, not allocative efficiency.[59]

Many circuit court cases also indicated that the paramount goal of antitrust is the protection of consumers, not the welfare of society. For example, the Sixth Circuit quoted a trial court's statement that the "the very purpose of antitrust law is to ensure that the benefits of competition flow to purchasers of goods affected by the violation."[60] Similarly, the Seventh Circuit declared: "The principal purpose of the antitrust laws is to prevent overcharges to consumers."[61] In *United States v. Microsoft Corp.*,[62] the D.C. Circuit, like the Supreme Court in *Leegin*, equated anticompetitive effect with consumer harm: "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers."[63] Likewise, the Tenth Circuit asserted: "To be judged anticompetitive, the [conduct] must actually or potentially harm consumers."[64]

More important, whenever the cases confronted a conflict between protecting consumers and promoting efficiency, they always chose consumers. Looking at merger cases, where the potential conflict between consumer welfare and total welfare is most often noted, Professor Lande and I concluded:

> No court in the United States . . . has ever allowed a merger that was likely to increase prices in the relevant market (or otherwise deprive consumers of the choices a competitive market would provide) on the ground that it was likely to enhance economic efficiency. To the contrary, the courts have uniformly insisted that merging parties cannot

58. *Id*. at 224. Similarly, the Court described "unsuccessful predation" as a "boon to consumers." *Id*.

59. The Court also stated that the legal standards it established were applicable in section 2 cases, *id*. at 222, suggesting that the Court saw the ultimate purpose of section 2 as consumer protection, not total welfare.

60. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 904 (6th Cir. 2003) (quoting *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 651 (E.D. Mich. 2000)).

61. Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 715 (7th Cir. 2006) (quoting Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 368 (7th Cir. 1987)), *cert denied*, 549 U.S. 1209 (2007).

62. 253 F.3d 34 (D.C. Cir. 2001).

63. *Id.* at 58. Both the Eleventh Circuit and the Fourth Circuit have quoted this statement. *See* Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071–72 (11th Cir. 2004); Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004); Dickson v. Microsoft Corp., 309 F.3d 193, 206 (4th Cir. 2002). To be sure, earlier in its opinion, the D.C. Circuit had linked competitive impact to "social welfare." *See Microsoft Corp.*, 253 F.3d at 58 ("The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."). The statement quoted above deserves more weight, however, because, unlike the earlier remark, it is part of the court's formulation of the legal standard to be applied in section 2 cases. *See id.* at 58–59.

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

> establish an efficiencies defense unless they show both that the merger would generate significant cost savings and that enough of those savings would be passed on to consumers that consumers would benefit from (or at least not be hurt by) the merger.[65]

Professor Hovenkamp recently asserted that courts have resolved conflicts between consumer welfare and total welfare in the same way in all areas of antitrust law:

> [I]f the evidence in a particular case indicates that a challenged practice facilitates the exercise of market power, resulting in output that is actually lower and prices that are actually higher, then tribunals uniformly condemn the restraint without regard to offsetting efficiencies. Indeed, one is hard pressed to find a single appellate decision that made a fact finding that a challenged practice resulted in lower market wide output and higher prices, but that also went on to approve the restraint because proven efficiencies exceeded consumer losses. In sum, courts almost invariably apply a consumer welfare test.[66]

Since our 2008 article, just a few appellate courts have commented on the goals of antitrust law. In the most important case, *California v. Safeway, Inc.*,[67] the Ninth Circuit explained that there are actually two, parallel goals—protecting consumers in sell-side cases and competitive suppliers in buy-side cases—as this Article suggests. The court then identified the ultimate touchstone as "consumer good":

> Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate. The touchstone is consumer good.[68]

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65. Kirkwood & Lande, *supra* note 53, at 225. The federal government's merger guidelines take the same position, recognizing efficiencies only to the extent that they prevent harm to consumers in the relevant market. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf ("[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market."); Hovenkamp, *supra* note 2, at 2476–77 (stating that, under the 2010 Guidelines, "if the merger is likely to result in a market-wide output reduction and price increase. . . . then the proponents of the merger will have an opportunity to show compensating efficiencies. But the magnitude of the efficiencies must be sufficiently large to offset any predicted price increase. In sum, the merger will be permitted only where there is no consumer harm, regardless of the size of the efficiencies.").

66. Hovenkamp, *supra* note 2, at 2477 (concluding that "antitrust policy in the United States follows a consumer welfare approach in that it condemns restraints that actually result in monopoly output reductions, whether or not there are offsetting efficiencies and regardless of their size.").

67. 651 F.3d 1118 (9th Cir. 2011).

68. *Id*. at 1132.

Similarly, the Second Circuit, in the course of analyzing a preemption issue, equated competitive effect with the impact on consumers.[69] Likewise, the Third Circuit refused to apply the "scope of the patent test" to a reverse payment settlement because, "while such a rule might be good policy from the perspective of name brand and generic pharmaceutical producers, it is bad policy from the perspective of the consumer, precisely the constituency Congress was seeking to protect."[70] The Eleventh Circuit described the "animating concern" of the Sherman Act as "consumer welfare," but said that it should be "understood in the sense of allocative efficiency."[71] The court relied on *Brooke Group* for this proposition without appreciating that the Supreme Court had equated consumer welfare with the benefits received by consumers in the relevant market, not with allocative efficiency.[72] While two other circuit court decisions described the fundamental objective as economic efficiency, both relied on precedent from the 1970s and 1980s without recognizing either conflicting precedent during that era or the substantial movement since then.[73]

In the last two decades, in short, a majority of decisions, at all levels of the federal courts, have described the overarching goal of the antitrust laws as the protection of consumers rather than the maximization of social welfare. Most decisions, of course, did not address the issue, but those that did typically characterized the ultimate purpose as protecting consumers, not enhancing efficiency. In buy-side cases, the courts likewise placed the emphasis on protecting small suppliers from exploitation, not promoting total welfare.[74] No court has allowed a practice or transaction that was

69. *See* Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 50 (2d Cir. 2010).

70. *In re* K-DUR Antitrust Litig., 686 F.3d 197, 217 (3d Cir. 2012). Although the court was referring to Congress's purpose in passing the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984), the court's characterization of the goal of antitrust law was identical. It quoted Judge Pooler's statement that the scope of the patent test "is insufficiently protective of the consumer interests safeguarded by the Hatch-Waxman Act and the antitrust laws." *In re K-DUR Antitrust Litig.*, 686 F.3d at 213 (quoting *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 224 (2d Cir. 2006) (Pooler, J., dissenting)).

71. Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010).

72. *See supra* notes 57–59 and accompanying text.

73. In *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 453–54 (D.C. Cir. 2010), Judge Williams wrote: "There has been a tension—and in federal antitrust law a radical change over time—between the goal of increasing consumer welfare in the economic efficiency sense and contrasting goals such as protecting small competitors or preventing the concentration of economic or political power without regard to economic efficiency." Judge Williams is correct that antitrust law has almost completely abandoned populist goals like the protection of small business and the deconcentration of social and political power. That change, however, occurred in the 1970s and 1980s. Since then, the courts' emphasis on efficiency has largely been replaced by a focus on consumer and small supplier protection, as this Article indicates. In *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282 (4th Cir. 2009), the court stated that the "purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." *Id*. at 290–91 (quoting Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986)). Instead of citing a recent case, however, the court relied on a twenty-seven-year-old Seventh Circuit decision.

74. *See* California v. Safeway, Inc., 651 F.3d 1118, 1132 (9th Cir. 2011); West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 105 (3d Cir. 2010) (concluding that

shown likely to harm consumers or small suppliers on the ground that it would improve economic efficiency.

At the same time, the courts have continued to allow firms to grow through superior performance, outcompeting their rivals by offering lower prices, better service, or higher quality products, even when the result is a monopoly. As Part II.B explains in more detail, however, this safe harbor for superior performance—for "competition on the merits"—is consistent with an overriding concern for the welfare of consumers rather than total welfare. Indeed, Judge Posner himself described the contours of section 2 liability in terms of consumer protection: "Most businessmen . . . want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run."[75]

This same consumer orientation underlies the popular support for antitrust laws.

C. Popular Support

Fortune found that even after the government had sued Microsoft, many people still thought highly of the firm and its products.[76] Nevertheless, "a very large majority—fully 80 percent—also believed that the Justice department ought to enforce antitrust laws."[77] When asked, "How important is the enforcement of antitrust laws?," 80 percent responded that it was "important."[78] *Fortune* did not ask why so many Americans supported antitrust enforcement, but it is likely that they favored antitrust not because they saw it as a way of increasing the efficiency of the economy, but because they viewed it as a way of protecting themselves and other consumers from exploitation at the hands of firms that have improperly acquired market power.

Numerous commentators have explained popular and political support for the antitrust laws in this way. Professors Havighurst and Richman declared: "[T]he antitrust laws enjoy general political support principally because the consuming public resents the idea of illegitimate monopolists enriching themselves at their expense."[79] The American Antitrust Institute stated that "antitrust cannot sustain political support over the long haul

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"paying [the plaintiff] artificially depressed reimbursement rates was an anticompetitive aspect of the alleged conspiracy"); Kirkwood & Lande, *supra* note 53, at 233–36.

75. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986). Posner also asserted that section 2 encourages hard competition by monopolists in order to promote economic efficiency. *See id.* at 375. But his willingness to explain section 2 as a consumer protection measure suggests that one can account for the safe harbor without assuming a total welfare goal.

76. *See* Rick Tetzeli & David Kirkpatrick, *America Loves Microsoft*, FORTUNE, Feb. 2, 1998, at 80.

77. *Id.* at 82.

78. *Id.*

79. Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847, 860 (2011).

unless it is employed and publicly recognized fundamentally as a consumer protection policy."[80] Nelson and White noted: "The social loss from the monopoly is the deadweight loss triangle, although the transfer of consumers' surplus from buyers to the monopolist clearly weighs importantly in the political support for antitrust policy."[81] Professor Orbach observed that "consumer welfare" is a "phrase of great rhetorical power"[82] and that "[e]very novice politician knows that he can gain some political capital by arguing that his agenda also promotes consumer interests."[83] Professor Kaplow, who believes that antitrust should pursue total welfare, nevertheless acknowledged that, "for external audiences, the term consumer welfare seems both more comprehensible and more appealing than total welfare."[84] The Areeda-Hovenkamp treatise commented: "Every member of society is a consumer, while not everyone is an entrepreneur, so the most 'populist' goal of all may be the one that promotes consumer welfare."[85] Thus, "any interest group approach to antitrust is best off to recognize 'consumers' as its protected class."[86] In explaining why competition is desirable, even among government entities, Professor Mankiw emphasized its benefits for consumers.[87]

The largest group of antitrust lawyers in the country, the Antitrust Section of the American Bar Association, proclaims on its logo that its mission is "Promoting Competition" and "Protecting Consumers."[88] The section does not refer to efficiency or social welfare. Neither does the

80. AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 9 (Albert A. Foer ed., 2008).

81. Philip B. Nelson & Lawrence J. White, *Market Definition and the Identification of Market Power in Monopolization Cases: A Critique and a Proposal* 6 (NYU, Working Paper No. EC-03-26, 2003), *available at* http://www.ssrn.com/abstract=1292646.

82. Orbach, *supra* note 3, at 135.

83. *Id.* at 145.

84. Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* 1 n.2 (Harvard Law & Econ. Discussion Paper No. 693, 2011), *available at* http://www.ssrn.com/abstract=1873432.

85. 1 AREEDA & HOVENKAMP, *supra* note 4, ¶ 100b.

86. *Id.* ¶ 111c.

87. Mankiw, an economist, did not mention economic efficiency:

> Most everyone agrees that competition is vital to a well-functioning market economy. Since the days of Adam Smith, economists have understood that the invisible hand of the marketplace works only if producers of goods and services vie with one another. Competition keeps prices low and provides an incentive to improve and innovate.
>
> Granted, competition is not always good for producers. I produce economics textbooks. I curse the fact that my competitors are constantly putting out new, improved editions that threaten my market share. But knowing that I have to keep up with the Paul Krugmans and the Glenn Hubbards of the world keeps me on my toes. It makes me work hard, benefiting the customers—in this case, students.

N. Gregory Mankiw, *Competition Is Healthy for Governments, Too*, N.Y. TIMES, Apr. 15, 2012, at 5 (Sunday Business).

88. The Section's logo also appears, among other places, on the front cover of its signature publication, the *Antitrust Law Journal*. *See, e.g.*, 78 ANTITRUST L.J. no. 2, cover pg. (2012).

Federal Trade Commission, whose website prominently features a single objective: "Protecting America's Consumers."[89]

In a recent address to the Antitrust Section, Senator Al Franken repeatedly characterized antitrust as a consumer protection measure. He noted, first of all, that "John Sherman himself said that the purpose of his landmark antitrust legislation was to protect consumers by preventing arrangements designed to increase the price they paid for goods."[90] He then explained, in many different ways, how antitrust enforcement affects consumers. For example, when the nation fails to enforce antitrust laws effectively, it poses "dangers . . . to consumers."[91] When AT&T held a monopoly, "consumers paid the price—exorbitant rates for long-distance service."[92]

> What we didn't need to question was what [the proposed merger of AT&T and T-Mobile] would mean for consumers. . . . [A]n independent analysis of the merger estimated that it would raise wireless prices by 12 to 25 percent for T-Mobile customers and 5 to 11 percent for AT&T customers. . . . The bottom line for consumers would have been worse service for more money.[93]

He also declared that "[w]hen a company is able to establish a dominant market position, consumers lose meaningful choices."[94] In short, throughout his speech Senator Franken measured antitrust enforcement against a single metric: whether consumers are better or worse off.

Franken's stance reflects an obvious fact: none of his constituents wants to pay artificially high prices for the products they buy. But popular support for antitrust law also has a deeper, normative basis. A pioneering study by Daniel Kahneman, Jack Knetsch, and Richard Thaler showed that many consumers regard monopolistic exploitation as unfair, whether or not they are the victims.[95] As Kahneman later summarized the key result, a "basic rule of fairness, we found, is that the exploitation of market power to impose losses on others is unacceptable."[96] For those who hold this belief, antitrust enforcement has moral value. Whether or not they have to pay higher prices, they regard their society as less fair if it allows firms to take advantage of unearned market power to extract wealth from their

89. *See* FTC, http://www.ftc.gov (last visited Mar. 19, 2013).

90. Al Franken, U.S. Senator, Minn., How Privacy Has Become an Antitrust Issue, Address to the Antitrust Section of the American Bar Association 4 (Mar. 30, 2012), *available at* http://www.huffingtonpost.com/al-franken/how-privacy-has-become-an_b_1392580.html.

91. *Id.* at 3.

92. *Id.*

93. *Id.* at 4.

94. *Id.* at 6.

95. *See* Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness As a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986).

96. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 306 (2011).

customers. In short, for people with this belief, antitrust is a component of a just society.[97]

Kahneman and his colleagues used telephone surveys to determine whether people would regard particular price increases as unfair. In one hypothetical, a hardware store had been charging $15 for snow shovels but raised the price to $20 after a blizzard. A very large majority of respondents (82 percent) considered this price increase unfair,[98] probably because the store had done nothing to deserve the increase, such as bring in additional shovels, at extra cost, in order to meet the post-storm demand. In other cases where a firm charged higher prices, not because its costs had increased but because it possessed market power, most people also characterized the high prices as unfair. For instance, respondents were "nearly unanimous in condemning a store that raises prices when its sole competitor in a community is temporarily forced to close."[99] More than three quarters of respondents thought it was unfair for a chain to charge higher prices in a community where it faced no competition, even though its costs were no higher in that locale.[100] And 91 percent disapproved of a landlord who raised the rent for one of his tenants beyond what he charged others because he learned that this tenant was unlikely to move.[101] In each of these cases, large majorities of those surveyed felt that it was unfair to force consumers to pay higher prices simply because the seller had the power to do so.

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97. This belief may also have economic significance. To the extent that people have a "taste for fairness" (that is, their utility increases when they perceive that their society has become more fair), greater fairness leads to greater total welfare, everything else equal. As Part II.A notes, this link between antitrust and total welfare is independent of the calculation of producer surplus and consumer surplus in a particular market. It represents an additional contribution to total welfare, the size of which depends on the economic value it has for people with this preference (that is, their willingness to pay for it).

98. Kahneman, Knetsch & Thaler, *supra* note 95, at 729.

99. *Id*. at 735.

100. *Id*. Other studies have found similar results. *See* Lan Xia, Kent B. Monroe & Jennifer L. Cox, *The Price Is Unfair! A Conceptual Framework of Price Fairness Perceptions*, 68 J. MARKETING 1, 4 (2004) (citing Kahneman, Knetsch & Thaler and two other studies for the proposition that when "buyers believe that sellers have increased prices to take advantage of an increase in demand or a scarcity of supply, without a corresponding increase in costs, they will perceive the new higher prices as unfair").

101. Kahneman, Knetsch & Thaler, *supra* note 95, at 735. People tend to regard price discrimination as unfair, even when they receive the lower price, unless there is a clear, acceptable basis for the differential. *See* Lan Xia, Kent B. Monroe & Jennifer L. Cox, *Is a Good Deal Always Fair? Examining the Concepts of Transaction Value and Price Fairness*, 31 J. ECON. PSYCHOL. 884, 892 (2010) (describing research finding that "paying a price that is less than the reference price may be perceived to be less fair *when the reference price is a higher price paid by another customer for a similar transaction*"); *id*. at 893 (suggesting "it may help [to reduce the perceived unfairness] to provide customers with a good rationale for the preferential treatment, such as stating that only loyal customers or customers with special status (e.g., senior citizens) have the opportunity to receive a lower price"); *see also* Ellen Garbarino & Sarah Maxwell, *Consumer Response to Norm-Breaking Pricing Events in E-commerce*, 63 J. BUS. RES. 1066, 1069 (2010) (finding a "broad-based and strong belief in the norm that all customers of the same retailer should be charged the same price").

Kahneman and his coauthors did not explore whether popular attitudes would have been different if the market power had been earned through superior performance. Presumably they would have been. After all, the overarching rule that the authors derive from their survey results would not condemn market power based on superior performance. According to the authors, the "cardinal rule of fair behavior is surely that one person should not achieve a gain by simply imposing an equivalent loss on another."[102] When a firm gains market power through procompetitive behavior, it does not simply impose a loss on its customers. Instead, its desirable behavior makes them better off. In addition, the ability to acquire market power through such behavior gives the firm an incentive to engage in it. For both reasons, market power earned through superior performance would not violate Kahneman's cardinal rule. His results are consistent, therefore, with the view that the American people generally disapprove of the exercise of market power where the power was attained through anticompetitive rather than procompetitive behavior.[103]

There appears to be no evidence that most people support the antitrust laws because they tend to raise the total wealth or total welfare of the country. Rather, people approve of antitrust enforcement because it protects them and other citizens from exploitation by firms that have acquired—but not earned—market power. People object to such exploitation because, like robbery or extortion, it is an unwarranted transfer of wealth, harming its victims (consumers or small suppliers) without providing offsetting benefits. When market power provides offsetting benefits—when it was created by a superior product, for example, or cost reductions that were passed on—the American people do not appear to regard it as unfair. The test for whether a benefit is offsetting, however, is whether it outweighs the harm to consumers or small suppliers from market power, not whether it enhances economic efficiency.

This normative framework appears to be acceptable to the business community as well. Business leaders do not, to my knowledge, argue that the antitrust laws ought to be interpreted in ways that elevate total welfare over consumer or small supplier protection, enabling businesses to raise prices to consumers or depress prices to small suppliers, so long as their conduct enhances economic efficiency. Rather, members of the business

102. Kahneman, Knetsch & Thaler, *supra* note 95, at 729.

103. While Kahneman and his colleagues did not study attitudes toward monopsonistic exploitation of small suppliers, it is highly likely that the public would also regard such exploitation as unfair. As Professor Stucke points out, many consumers object when companies outsource production to foreign factories that pay low wages, require long hours, and provide poor working conditions, even when those terms are set in a competitive market and benefit consumers. *See* Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. (forthcoming 2013) (manuscript at 43), *available at* http://ssrn.com/abstract=2094553 ("Although consumers can economically benefit from the exploitation of sellers, they nonetheless object to such exploitation. We see this with Nike, Apple, and the growth of Fair Trade products."). If consumers object when firms pay competitive prices to small suppliers, they would object even more when firms with monopsony power force vulnerable suppliers to accept prices below the competitive level.

community seem comfortable with an antitrust enforcement regime focused on consumer and small supplier protection. In large part, that is because the antitrust laws, as currently interpreted, give businesses considerable flexibility to pursue profits and growth. As this Article has emphasized, the antitrust laws permit a firm to dominate the marketplace through superior performance, a doctrine that generally benefits both the successful firm and the customers that it serves.[104] In addition, over the last thirty years, the courts have substantially loosened restrictions on business behavior, making it easier for firms to gain market share through procompetitive conduct.[105] If these changes were undone, business opposition to the content and goals of antitrust would undoubtedly arise but, at present, there is no widespread objection to a standard that aligns antitrust law with one of the most frequently articulated strategic objectives of business—serving customers.

This orientation also makes the antitrust laws easier to administer. When antitrust has a single target in sell-side cases and a comparable objective in buy-side cases, it is easier to explain the law to judges and juries and easier to resolve disputes.

D. Ease of Administration

A consumer protection standard supplies a simple and straightforward test for evaluating the competitive significance of conduct: does it make consumers better or worse off? In many cases, the inquiry under such a standard is elementary: would the conduct cause prices to go up or down? In contrast, a total welfare standard requires a broader inquiry. In cases in which the challenged conduct would impose losses on consumers, the ultimate issue under a consumer protection standard has already been resolved: consumers would be hurt. Under a total welfare standard, however, the losses to consumers must be compared to any gains that the producers would realize, since a reduction in consumer surplus could be offset by an increase in producer surplus. A total welfare standard, as its name implies, is broader than a consumer protection standard and entails additional analysis.

This difference does not matter in cases subject to a bright line rule. In such cases, courts and enforcement agencies can apply the rule without determining the actual or probable effects of the challenged practice. The administrability of such a rule depends on how clear it is, not on the substantive goals or objectives it is designed to achieve. Thus, if the rule is bright enough, it can be intended to further multiple objectives, noneconomic as well as economic, without creating administrative

104. For further elaboration, see *infra* Part II.B.1.

105. *See* Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2185 (2013) (listing the principal changes in antitrust rules since the mid-1970s and stating that "in general, the rules were modified for a good reason: they chilled cost reductions and other efficiency-enhancing conduct").

difficulties.[106] But where effects must be assessed, a consumer protection standard would be easier to implement.

To be sure, under either a consumer or small supplier protection standard, it is necessary to identify the consumers or suppliers to be protected. In a sell-side case, for example, should antitrust law focus on the immediate purchasers, the consumers in the relevant market, or the end users, the ultimate consumers? As Lande and I have recommended, the pertinent consumers should be the consumers in the relevant market.[107] This makes administration easier, for otherwise it would be necessary to trace the effects of a practice down to final consumers, an inquiry that can be quite difficult.[108] Moreover, direct purchasers frequently pass on at least part of a price rise to end users, making impact on direct purchasers a reasonable proxy for impact on ultimate consumers. For the same reasons, in a buy-side case, the pertinent suppliers should ordinarily be the direct suppliers.[109]

Identifying the relevant consumers significantly enhances the administrability of a consumer protection standard, but it does not eliminate every issue. The challenged conduct may have different effects on different customers, its short-run impact may differ from its long-term impact, and its consequences for the price of the relevant product may diverge from its effects on quality or variety. All of these issues must be addressed, since the fundamental question under a consumer protection standard is the effect of the behavior on the long-term well-being of consumers in the relevant market. In principle, of course, if sufficient information is available, an aggregate long-term impact may be determined but, in practice, the effort

106. *See, e.g.*, Stucke, *supra* note 5 (advocating the development of bright-line rules that would further multiple objectives, not just consumer welfare or total welfare). In the absence of a bright-line rule, however, a legal standard that required courts to assess the effects of conduct on multiple objectives is likely to be onerous to administer. It would require judges or juries to measure the actual or probable impact of the practice on each of the objectives and then weigh those effects against each other, a task that would be challenging, time consuming, and sometimes arbitrary.

107. *See* Kirkwood & Lande, *supra* note 53, at 203 ("[A]ny direct purchaser should be deemed a 'consumer' for antitrust purposes, regardless of what he or she decided to do with the good or service purchased.").

108. *Id*. (explaining that if immediate purchasers are not the focus, "every price rise caused by a monopoly, cartel, etc. would have to be examined to determine whether it had been absorbed by intermediaries or whether, and to what degree, it had been passed on to [ultimate] consumers"); *see also* Werden, *supra* note 20, at 730 ("If end-user welfare were made the touchstone, it would become necessary to trace the incidence of effects all the way down the distribution chain. This necessarily would impose an additional burden on plaintiffs and the courts; moreover, in some cases, no end-user harm flows from conduct normally considered anticompetitive.").

109. Thus, where buyers exercise monopsony power against competitive suppliers, it would not be necessary to trace the effects further upstream. Where the direct suppliers have significant market power, however, and buyers exercise countervailing power rather than monopsony power against them, it may be necessary to look further upstream, since in such cases it is sometimes possible for the effects of countervailing power to be "passed back" to competitive suppliers further upstream. *See* Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PA. J. BUS. L. 775, 807–08 (2012); Kirkwood, *supra* note 11, at 1554–56. In such cases, it would be appropriate to focus on the more remote suppliers.

may be difficult and subjective. The same kinds of problems, however, must be faced under a total welfare standard, which must also determine the probable impact of the challenged conduct on consumers. In short, a total welfare standard is no easier to administer than a consumer protection standard and, in any case where gains to producers must be offset against losses to consumers, a total welfare standard is more burdensome.

In addition, the analysis under a total welfare standard is more complicated than the analysis under a consumer protection standard. Under a consumer protection standard, the easiest way to show consumer harm is to establish that the challenged conduct would cause prices in the relevant market to go up, unaccompanied by any increase in quality or service. As a result, consumers would pay more for the relevant product and a portion of their wealth would be transferred to the producers. Under a total welfare standard, however, this transfer of wealth is ignored, since the other protected group under the standard—producers—receives the transferred wealth. What counts under a total welfare standard is the allocative inefficiency caused by the overcharge, the lost sales or deadweight loss produced by the price increase, and it may be more difficult to estimate that magnitude than to determine whether or not prices will rise.[110]

The analysis of productive efficiency is also more complex under a total welfare standard. Under both standards, it is necessary to evaluate whether the challenged practice would generate efficiencies of sufficient magnitude and appropriate type to cause prices to fall or consumers to benefit in other ways. If consumers would benefit, the practice would be procompetitive under either standard. If the practice would harm consumers, however, it would be condemned, without more, under a consumer protection standard. But under a total welfare standard, a court or agency would still have to determine whether its beneficial effect on productive efficiency would outweigh its adverse effect on allocative efficiency.[111] And that step would

110. *See* Hovenkamp, *supra* note 2, at 2478 (deadweight loss "results from unmade sales and inefficient substitutions and is much more difficult to assess than simple overcharges"). The administrative advantage of a consumer protection standard is greatest when prices have already gone up. Then, under a consumer protection standard, the only question is whether there was an innocent explanation for the increase, such as higher costs or a spurt in demand. Under a total welfare standard, however, it would be necessary not only to rule out innocent explanations but also to calculate the impact of the price increase on allocative efficiency, which would require measuring the elasticity of demand. In contrast, the standards may differ little, if at all, in their administrability when the question is whether the challenged conduct is likely to result in a *significant* price increase (say 5–10 percent). Under either standard, answering that question would require estimating the elasticity of demand.

111. *See, e.g.*, Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 489 (2012) (recognizing the need for "reliable estimates" of both "the prospective cost savings and the prospective allocative inefficiency" in order to apply a total welfare standard, and noting that this is "a particularly daunting requirement" in the case of a proposed merger because "both estimates are needed before the merger is actually approved"); *see also* Alan A. Fisher, Frederick Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 809–13 (1989); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger*

require looking at all aspects of productive efficiency, not just those that would affect prices in the relevant market. In particular, savings in fixed costs that would not normally be considered in assessing the impact of a merger on prices (because they would not affect the total quantity produced by the merging parties) would have to be considered in measuring producer surplus (because they would contribute to the parties' profits from the transaction).[112]

In sum, where effects on competition must be assessed, it is likely to be less complicated and less costly to perform that assessment where the ultimate goal is the protection of consumers and small suppliers rather than total welfare.[113] Given these difficulties, it is not surprising that no U.S. court has ever attempted a full total welfare calculation.[114]

II. OBJECTIONS

As the prior part demonstrated, the goal of protecting consumers and small suppliers from anticompetitive conduct is deeply rooted in the legislative history, widely endorsed in the case law, broadly supported by the American people, and relatively easy to administer. To depart from that goal—to allow firms that have gained market power without earning it to exploit consumers or small suppliers in the relevant market—requires a powerful counterargument. Two principal counterarguments have been

Enforcement, 71 CALIF. L. REV. 1580, 1624–77 (1983) (detailing the difficulties involved in assessing a merger's impact on economic efficiency).

112. *See* Baker, *supra* note 105, at 2178 n.13 (observing that "courts are less likely to make mistakes" in evaluating merger efficiencies "when applying a consumer welfare standard than an aggregate surplus standard, as the consumer surplus criterion avoids the need to analyze fixed cost savings").

113. *See* Hovenkamp, *supra* note 2, at 2496 ("When one considers both efficiency and administrability, consumer welfare emerges as the most practical goal of antitrust enforcement. In cases where consumer effects are more-or-less uniform, the consumer welfare principle usually requires smaller amounts of information to implement and avoids the costs and numerous errors associated with any kind of balancing of welfare gains and losses to different groups."); *id*. at 2478 ("If true quantification of deadweight consumer losses and producer gains were required, antitrust would be way outside of its competence.").

"When no firm conclusions can be drawn about consumer impact," Hovenkamp would consider producer gains: "For example, if a tying arrangement produces significant producer gains but impacts different consumers differently and net harm or benefit is impossible to determine, then the law should be reluctant to intervene." *Id*. at 2496. This makes sense because producer gains from increased efficiency free up resources for use in other markets, raising output and lowering prices in those markets, benefiting the consumers in those markets. *See infra* note 115. Thus, when it is impossible to tell whether conduct would reduce the overall welfare of consumers in the relevant market, but it is clear that the conduct would enhance productive efficiency, a court should allow the conduct, since it would enhance the well-being of consumers in other markets (and raise total welfare).

114. Only one foreign court has made such a calculation. The Canadian Competition Tribunal allowed the merger of Superior Propane and ICG Propane, even though it would harm consumers, because the Tribunal calculated that it would produce a substantial increase in total welfare, a decision that was affirmed on appeal. *See* Comm'r of Competition v. Superior Propane, Inc., [2003] 3 F.C. 529 (Can.). For a summary of the Tribunal's analysis, see Kirkwood & Lande, *supra* note 53, at 227–28 n.171.

advanced. Both maintain that the ultimate objective of antitrust should be total welfare, at least in certain cases, and that the interests of consumers or small suppliers in the relevant market should be trumped by aggregate welfare where the two conflict. The first argument is that total welfare is a superior goal from a normative perspective because it is more comprehensive. The second is that total welfare is the goal of section 2 of the Sherman Act, because Congress and the courts have made clear that a firm does not violate section 2 if it gains monopoly power through superior efficiency. In the following sections, I address each argument. I also address a more limited attack on the consumer protection standard: the argument that antitrust enforcement would actually harm consumers if it brought down the prices of dangerous goods like cigarettes or status goods like fancy watches.

A. The Normative Attraction of Total Welfare

Compared to consumer or small supplier protection, total welfare is a more inclusive goal. In a sell-side case, total welfare takes into account the impact of a practice on producers as well as consumers. Moreover, it reflects effects on consumers in other markets as well as consumers in the relevant market. Consider a merger that will raise prices in the relevant market but also reduce costs significantly. Such a transaction will plainly harm consumers in the relevant market. But it will also benefit the owners of the merging firms, who will gain both from the higher prices that they charge and the lower costs that they realize. Further, these cost savings will free up resources formerly committed to the relevant market, allowing other products in the economy to be made more cheaply, benefiting consumers in other markets.[115] A total welfare standard reflects all these effects, not just the impact on consumers in the relevant market. From the perspective of society as a whole, therefore, total welfare is arguably the superior goal.

The problem is that the total welfare standard ignores the transfer of wealth from consumers to producers.[116] Yet that transfer is objectionable on two grounds. It may have an adverse distributional impact, increasing the unequal dispersion of wealth in the country—a particularly sensitive issue at the moment.[117] But more importantly, the transfer is exploitative:

115. *See* Blair & Sokol, *supra* note 111, at 484–85 ("The sellers' costs fall because fewer of society's scarce resources are needed to produce the output being sold. These resources are then available to produce goods and services in other markets. The consumer benefits flowing from these cost savings may be diffused throughout the economy, but they exist nonetheless."); Meese, *supra* note 3, at 2237–39 ("[C]ost reductions [from a merger] will also manifest themselves as resources freed up for other possible uses. . . . As a result, firms in other markets will employ more such inputs, increasing their own output as a result . . . . Moreover, output increases in other markets will presumably reduce prices in such markets, thereby *increasing* the welfare of consumers in such markets.").

116. The transfer is ignored because the loss to consumers is offset, dollar for dollar, by the gain to the merging firms, leaving total surplus unaffected.

117. *See, e.g.*, JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL (2007); JOSEPH E. STIGLITZ, THE

like robbery, it is a form of coerced taking. The merger would enable the merging firms to acquire market power they would not otherwise have, use that power to force consumers to pay higher prices, and thereby extract consumers' wealth without providing them with countervailing benefits. Such exploitation is widely regarded as unfair.

To be sure, if a practice did increase total welfare, then in principle this taking could be avoided. Those who gain from the practice—producers in the relevant market and consumers in other markets—could compensate those who are hurt—consumers in the relevant market—and still come out ahead. If such compensation were provided and consumers in the relevant market were fully protected, there would be no need for a consumer protection (or small supplier protection) standard. Consumers and small suppliers would be insulated from harm by the combination of a total welfare standard and compensation. But compensation is costly to provide, whether it is accomplished through retrospective lawsuits designed to make consumers whole or prospective injunctions designed to prevent consumer harm in the first place. Indeed, prospective injunctions would represent a type of price regulation. If firms were allowed to adopt practices that promoted total welfare, so long as they did not harm their customers, firms would have to offer prices and other terms that were at least as beneficial to their customers as they would have offered in the absence of the practices. Policing that requirement over time, as costs, demand, and technology change, would involve courts in the kind of detailed and counterproductive oversight associated with price regulation.[118]

It is unlikely, therefore, that antitrust policy would actually attempt to ensure that consumers were never hurt by a practice that increased total welfare. Instead, under a total welfare standard, practices that harm consumers in the relevant market would be allowed so long as aggregate welfare increased. And under the conventional calculation, that would be determined by comparing the increase in producer surplus to the reduction in consumer surplus. That method, however, ignores a significant component of total welfare: the utility or satisfaction that people derive from the perception that the legal system is fair and, in particular, from the perception that it protects consumers from exploitation at the hands of firms that have gained market power illegitimately. If this "taste" for fairness—for the avoidance of anticompetitive exploitation—were included in the total welfare calculation, as it should be, a total welfare standard would move significantly closer to a consumer and small supplier protection standard.

PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012); *see also* ACEMOGLU & ROBINSON, *supra* note 29, at 320 (noting that in the years following the Civil War, when the trusts were being formed, "competition gave way to monopoly, and wealth inequality rapidly increased").

118. *See* Baker, *supra* note 105, at 2178 n.11 ("A robust tax and transfer system could prevent consumer losses. But with respect to the consumer harm from antitrust violations, that is more a theoretical possibility than a practical corrective." (citation omitted)).

Although it is seldom recognized, there is no doubt that a taste for fairness, like any other preference, should be part of the total welfare calculus. The best known proponents of the view that legal standards should be based on total welfare, Professors Kaplow and Shavell, state that "any factor that influences individuals' well-being is relevant under welfare economics, and a taste for fairness is no different in this respect from a taste for a tangible good or for anything else."[119] They explain: "The notion of well-being used in welfare economics is comprehensive in nature. It incorporates in a positive way everything that an individual might value."[120] Professors Brock and Obst agree: "If individuals value something, then it is economically valid—indeed, essential—that it be explicitly incorporated into an analysis of economic welfare."[121] In short, total welfare should include the value that Americans place on avoiding wealth transfers that result from anticompetitive behavior. In evaluating a merger that would raise price and reduce costs, therefore, a total welfare calculation should examine not only the reduction in consumer surplus and the increase in producer surplus that would result from the merger but also the dissatisfaction that the American people would experience if the merger were allowed and consumers in the relevant market were exploited by the merged firm.

As Kaplow and Shavell emphasize, the economic value of this dissatisfaction is an empirical matter.[122] While there does not appear to be any direct evidence, there is considerable indirect evidence. Protecting consumers and small suppliers from anticompetitive exploitation is the dominant objective in both the legislative histories and the recent case law, and it undergirds the current popular and political support for antitrust enforcement.[123] This does not prove that consumer protection and small supplier protection are so important that they essentially eliminate any difference between a total welfare standard and a consumer and small supplier protection standard. But it does indicate that many people would not want a legal system that allows firms to overcharge their customers or underpay their small suppliers, so long as the practices that made this possible enlarge the total surplus in the relevant market.[124] It also indicates

119. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 11–12 (2002).

120. *Id.* at 18; *see also id.* at 21 ("[An] individual might derive pleasure from knowing that vicious criminals receive their just desserts (independent of the anticipated effects of punishment on the incidence of crime) or that legal rules reflect a favored conception of fairness. In such cases, satisfying the principle of fairness enhances the individual's well-being, just as would satisfying his preference for wine.").

121. James W. Brock & Norman P. Obst, *Market Concentration, Economic Welfare, and Antitrust Policy*, 9 J. INDUS. COMPETITION & TRADE 65, 69 (2007).

122. KAPLOW & SHAVELL, *supra* note 119, at 12 ("[T]he welfare economic significance of a notion of fairness depends directly on the strength of individuals' actual tastes for it and is thus an entirely empirical issue.").

123. *See supra* Part I.A–C.

124. *Cf.* Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 439–40 (2001) ("Citizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct." (quoting Marc

that, at a minimum, the total welfare standard must incorporate the value that Americans place on fair pricing. And incorporating that value into the total welfare calculus would increase the difficulties of administering it.[125]

B. The Exceptionalism of Section 2

Professor Meese has argued that section 2 of the Sherman Act is an exception from the other provisions of the major antitrust laws.[126] Its goal, unlike the aim of the other provisions, is total welfare.[127] The main pillars of this argument, however, are inadequate to support that conclusion. First, section 2's safe harbor for superior performance does not show that the overarching goal of section 2 is total welfare. The safe harbor is equally consistent with a desire to encourage conduct that is likely to benefit consumers. Second, while some cases do say that the objective of section 2 is economic efficiency, other cases—and in recent years, most other cases—indicate that the overarching aim is consumer protection. In addition, there is no good reason and no direct support in the legislative history for the view that Congress passed most of the major antitrust

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Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1450 (1993))).

125. One attraction of a total welfare standard is that it gives more weight to gains in productive efficiency than a consumer protection standard, and these gains tend to benefit consumers in other markets. *See supra* note 111. As a result, elevating consumer protection over total welfare tends to favor consumers in the relevant market over consumers in other markets. One reason to do so, of course, is the normative importance of protecting consumers in the relevant market from exploitation at the hands of firms that have acquired market power illegitimately. Another reason is the difficulty of determining how much consumers in other markets would benefit from an increase in productive efficiency in the relevant market. Price reductions in other markets depend on the nature and extent of the resources that flow into them and the supply and demand elasticities in those markets, and none of these factors is easy to measure.

To be sure, there may be cases in which consumers in other markets would clearly gain more than consumers in the relevant market would lose. It may be plain, for example, that the challenged conduct would generate major increases in productive efficiency yet hardly raise prices in the relevant market. But that is no more a decisive objection to a consumer protection standard than the reverse case is a fatal objection to a total welfare standard—the case in which a small gain in productive efficiency accompanies a major price increase. *See supra* note 14 (describing a joint venture that would enhance total welfare, even though it would raise the price of the venture's output by 300 percent, because it would lower manufacturing costs 1 percent). Whatever standard is chosen, antitrust law would have to resolve such extreme cases—cases in which there is a small gain in the preferred value and a large reduction in the competing value. Under either standard, courts might want to create an exception for the extreme cases. *See* Jonathan B. Baker, *Competition Policy As a Political Bargain*, 73 ANTITRUST L.J. 483, 520 n.137 (2006) ("[A]ntitrust should seek to protect consumers [in the relevant market] except when the aggregate efficiency costs of doing so would be large."). But in order to preserve clear and administrable rules of law, those exceptions should be highly limited, if they are allowed at all.

126. Meese, *supra* note 16.

127. Meese acknowledges that the apparent purpose of section 1 is the protection of consumers in the relevant market or, as he puts it, purchaser welfare. *See id*. at 733 ("The balancing test that courts employ under section 1 of the Act at least purports to condemn restraints that reduce purchaser welfare."); *id*. at 735 (referring to "section 1's seeming reliance on a purchaser welfare standard").

provisions to protect consumers and small suppliers but enacted section 2 to promote total welfare.

1. The Safe Harbor for Superior Performance

It is bedrock section 2 law that a firm may gain a monopoly through superior performance, whether such performance involves inventing a better product, improving efficiency and then charging lower prices, or otherwise outcompeting rivals. In the legislative debates, as noted above, Senator Hoar stated that "a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist."[128] Subsequent cases have affirmed this principle, declaring, for example, that a firm may lawfully obtain a monopoly through competition on the merits,[129] superior skill,[130] or competition based on efficiency.[131] There is no doubt, in other words, that Congress and the courts have established a safe harbor for monopoly power acquired or maintained through desirable conduct. The question is whether that safe harbor represents an exception from the consumer protection standard that animates the other major antitrust provisions or whether, instead, the safe harbor itself serves consumer interests.

Meese argues that the safe harbor reflects a preference for total welfare because it permits an "efficient monopolist": a firm that gains monopoly power by means of "above-cost pricing that falls below competitors' prices (due perhaps to economies of scale) and that drives less efficient firms from the marketplace, thereby empowering the monopolist to raise prices."[132] It is true that such conduct, which creates monopoly power through superior efficiency, is likely to increase total welfare. It will reduce the costs of producing the relevant product, and that increase in productive efficiency is likely to outweigh the reduction in allocative efficiency caused by the monopoly pricing. After all, the high prices do not occur until after the firm has attained market dominance.

But while such conduct is likely to increase total welfare, it is also likely to benefit consumers in many cases. Purchasers in the relevant market benefit directly from the low prices that the firm charges when it passes on

128. 21 CONG. REC. 3152 (1890).

129. *See* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), (distinguishing conduct that furthers the "dominance of a particular firm" and "unnecessarily exclude[s] actual and potential competition" from "competition based on pure merit"), *aff'd per curiam*, 347 U.S. 521 (1954).

130. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (noting that some firms may gain a monopoly "merely by virtue of . . . superior skill, foresight and industry" but refusing to condemn such behavior because the monopoly would be "the resultant of those very forces which it is [the Sherman Act's] prime object to foster").

131. Aspen Skiing Corp. v. Aspen Highlands Skiing Co., 472 U.S. 585, 605 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." (citing BORK, *supra* note 18, at 138)).

132. Meese, *supra* note 16, at 681.

its superior efficiency and drives out its competitors. And those low prices occur first in time, which means they get the greatest weight in any calculation of the present discounted value of the firm's conduct. While consumers are harmed when the firm attains a monopoly, the extent of that harm depends on the degree and duration of the price elevation. If the price increase is limited in size or does not persist for long, its adverse effects would be outweighed by the earlier and later periods of low pricing. In this scenario, consumers may often benefit on balance.

Without a definitive study of the issue, it is impossible to say with confidence that the safe harbor in section 2 is in fact good for consumers. But there are several reasons to think that the safe harbor furthers consumer interests. For one, Meese does not contest the proposition. He recognizes that a number of scholars contend, as I do, that the safe harbor is consistent with a consumer welfare standard,[133] but he does not dispute the accuracy of this claim. Rather, he argues that it "ignores the intellectual roots of the safe harbor, which the Harvard School developed and endorsed as a means of furthering *total* welfare and *not* the welfare of purchasers."[134] That may be the case, although Areeda himself rejected the views of the "efficiency extremists" and embraced a consumer protection standard after Lande published his classic article.[135] But whatever its genesis, the safe harbor is now seen by most courts as a device for advancing the interests of consumers.[136] Second, it is difficult to formulate legal standards that better promote the long-term interests of consumers than the existing safe harbor. If that is true, as I indicate below, it is hard to conclude that the safe harbor can only be explained by a preference for total welfare. Finally, it is clear that consumers often benefit from the safe harbor when the superior performance takes the form of innovation. When a new product is brought to the market, purchasers are frequently better off, even if the firm charges a supracompetitive price, because they have the option of purchasing the existing product if they do not like the new offering.[137]

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133. *See id.* at 721 (citing Jonathan A. Jacobsen & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 781–83 (2006)); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 465 (2006).

134. Meese, *supra* note 16, at 721.

135. *See supra* note 19.

136. *See infra* Part II.B.2.

137. If, instead, the firm withdraws its existing product when it introduces a new one, a presumption of consumer benefit may not be warranted. But, in that case, it may be equally inappropriate to characterize the new product introduction as superior performance. *See* Press Release, FTC, FTC Files Amicus Brief Explaining That Pharmaceutical "Product Hopping" Can Be the Basis for an Antitrust Lawsuit (Nov. 27, 2012), *available at* www.ftc.gov/opa/2012/11/doryx.shtm. The press release explains:

> Brand name pharmaceutical companies can try to obstruct generic competitors and preserve monopoly profits on a patented drug by making modest reformulations that offer little or no therapeutic advantages, a tactic known as "product-switching" or "product hopping" . . . . Prior to facing generic competition, a brand drug company can, for example, simply withdraw its original product, forcing consumers to switch to the reformulated brand drug and enabling the branded

In comparing a total welfare standard to a consumer welfare standard, Meese sometimes misstates the consumer welfare standard. He asserts: "Under . . . the purchaser welfare standard, courts should ban all conduct that creates market power and thus raises prices that parties pay in the relevant market."[138] As Lande and I have indicated, however, a consumer protection standard would not ban all conduct that creates market power; it would prohibit conduct that creates market power *without justification*.[139] Its aim is to stop firms from obtaining market power without earning it—that is, without providing consumers with compensating benefits. This is the essence of anticompetitive conduct: it creates market power but does not provide consumers or small suppliers with offsetting benefits that justify the conduct.

Nor does the fact that the safe harbor is a bright-line rule—a rule of per se legality for conduct within the safe harbor—mean that the safe harbor can only be warranted by a total welfare goal. As existing law makes clear, a consumer and small supplier protection standard also employs bright-line rules or other devices to simplify antitrust litigation and enhance its deterrence value. The difference is that, under such a standard, the aim is to advance the long-term interests of consumers and small suppliers, not promote total welfare even when their interests are harmed. Professor Elhauge explains:

> The fact that antitrust law embraces a consumer welfare standard does not mean that courts must assess consumer welfare effects on a case-by-case basis. Often they use rules, like the quasi per se rule [for tying], that identify conduct likely to harm consumer welfare. It just means that consumer welfare is the ultimate metric used to design antitrust laws, whether they take the form of rules or standards.[140]

> company to keep its market exclusivity and preventing consumers from obtaining the benefits of generic competition.
>
> This "product-hop" may succeed despite the fact that consumers would not likely choose the new product. As the amicus brief states: "In the pharmaceutical industry . . . the success of a product-switching scheme does not depend on whether consumers prefer the reformulated version of the product over the original, or whether the reformulated version provides any medical benefit." Instead of making a choice, consumers are denied a real choice.

Id.

138. Meese, *supra* note 16, at 669; *see also id.* at 662 ("Under [the] 'purchaser welfare' standard, the acquisition of monopoly due to economies of scale would be unlawful whenever purchasers in the relevant market pay high prices.").

139. *See* Kirkwood & Lande, *supra* note 53, at 242 ("Congress' principal objective . . . was to prevent firms from *acquiring or maintaining market power without justification* and then using that power to raise prices to consumers." (emphasis added)); *see also id*. at 192 ("The fundamental goal of antitrust . . . is to protect consumers in the relevant market *from anticompetitive behavior* that exploits them—that *unfairly* transfers their wealth to firms with market power—not to increase the total wealth of society." (emphasis added)); *id*. at 193 ("In both sell-side and buy-side cases, . . . the ultimate goal is the same—preventing firms *that have unfairly acquired power* from exploiting their trading partners, buyers or sellers." (emphasis added)).

140. Elhauge, *supra* note 5, at 437 n.104. It is incorrect, therefore, to claim that "embrace of a purchaser welfare standard would entail application of a consumer welfare balancing

Mark Popofsky concurs:

> Courts select the legal test that assertedly maximizes long-term consumer welfare or, put in the language of balancing, is on balance best for consumers. The appropriate test—the level of intervention—does not necessarily ask whether the conduct produces net anticompetitive effects *in a particular case*. Rather, courts determine at the step of selecting the appropriate legal test whether the proposed test itself is better for consumers than other liability tests.[141]

Under a consumer and small supplier protection standard, courts can and do use bright-line tests, presumptions, and safe harbors to create a legal system that serves the interests of consumers in sell-side cases and small suppliers in buy-side cases, taking into account the costs of administering the system and its impact on deterrence. The legal rules that emerge may not always be optimal, but the departures generally reflect, especially in recent years, a concern with deterring procompetitive behavior rather than an expressed intent to promote total welfare.[142] Indeed, the safe harbor for superior performance is itself based on the same concern: a desire to encourage competitive success and to protect firms that have won the competitive race from antitrust liability.[143] And this goal plainly serves consumer interests, since those who win the race have provided their customers with the best combination of prices, products, and service

test [under which] courts would balance any benefits produced by a challenged practice against its harms." Meese, *supra* note 16, at 736. Elsewhere, Meese recognizes this, noting that "administrative costs are real," and that "a rule may seek to implement a particular normative standard without actually condemning every instance of conduct that offends that standard in the real world." *Id.* at 671.

141. Popofsky, *supra* note 133, at 448; *see also id.* at 481 ("For the conduct at issue, courts attempt to select the liability test that minimizes error and legal process costs and thereby makes consumers in the long run better off relative to applying other legal tests to that conduct."); *id.* at 465 (explaining that when courts create a safe harbor, they "reason[] that engaging in a case-specific assessment of net effects on consumers in these circumstances is fraught with difficulty, will undermine ex ante incentives to compete, and thus is not in consumers' best interests").

142. *See infra* Part II.B.2 (analyzing cases). Moreover, it is difficult to develop better rules when they have to be justified not only in terms of their conceptual soundness but also in light of their administrability and deterrence effects. I have suggested, for example, a new legal standard to control above-cost pricing, a standard that would combine a consumer welfare test with a no-economic-sense defense. *See* John B. Kirkwood, *Controlling Above-Cost Predation: An Alternative to* Weyerhaeuser *and* Brooke Group, 53 ANTITRUST BULL. 369 (2008). It is not obvious, however, that this standard would be no more burdensome to administer than the current test for predatory pricing, yet produce a better balance of false positives and false negatives. While there is good reason to believe that it would meet both criteria, the only way to know is to try it. The point is that even a relatively conservative legal rule, like the current test for predatory pricing, may actually be the best way to protect consumers. It is unnecessary to resort to a total welfare goal to explain the test.

143. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 707 (1975) ("[D]enying monopoly profits to those whose power was obtained by superior skill, foresight, and industry could eliminate the primary incentive to develop such competitive skill.").

offered. In short, one cannot reason from the existence of the safe harbor to the conclusion that the fundamental aim of section 2—the objective that should prevail in cases of conflict—is economic efficiency rather than consumer and small supplier protection.

2. The Case Law

The case law has not endorsed the view that the overarching goal of section 2 is total welfare. While the cases firmly recognize the safe harbor for superior performance, and a significant number describe the safe harbor as protecting competition on the merits or competition based on efficiency, no case in the last two decades has declared that the aim of section 2 is economic efficiency rather than consumer protection. Nor has any case allowed conduct that would harm the long-term interests of consumers on the ground that it would enhance total welfare. Today, most decisions that address the ultimate aim of section 2 describe it in terms of consumer protection.

In rejecting a refusal-to-deal claim under section 2, for example, the Tenth Circuit stated that to force the defendant to deal with the plaintiff "well might deter future investments of the sort . . . made in this case—and thus to undermine, rather than promote, investment, innovation, and *consumer choice*."[144] The court also observed that the plaintiff

> might be better off with such a shared monopoly, but there's no guarantee *consumers* would be. Whatever injury he may have suffered, then, it is not one the antitrust laws protect because "a producer's loss is no concern of the antitrust laws, which *protect consumers* from suppliers rather than suppliers from each other."[145]

Similarly, the Ninth Circuit declared that section 2 should be interpreted so that it does not "punish economic behavior that benefits consumers."[146] The court adopted a cost-based test for bundled discounts because it thought that it was "the course safer for consumers and our competitive economy."[147] This is especially significant because the court recognized that a more open-ended test, like that adopted in *LePage's Inc. v. 3M*,[148] could "protect a less efficient competitor."[149] Yet the court's reluctance to protect less efficient rivals was not based on a desire to promote total welfare. The court stated that such protection would come "at the expense of consumer welfare"[150] and noted that the *LePage's* standard "risks curtailing price competition and a method of pricing beneficial to

144. Four Corners Nephrology Assoc. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1224 (10th Cir. 2009) (emphasis added).

145. *Id.* at 1226 (emphasis added) (quoting Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)).

146. Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 903 (9th Cir. 2008).

147. *Id.*

148. 324 F.3d 141 (3d Cir. 2003) (en banc) (discussed *infra* at notes 154–59).

149. *Cascade Health Solutions*, 515 F.3d at 899.

150. *Id.*

customers."[151] Likewise, in *United States v. AMR Corp.*,[152] another section 2 case evaluating low pricing, the Tenth Circuit refused to adopt a short run profit sacrifice test because it "could lead to a strangling of competition, as it would condemn nearly all output expansions, and harm to consumers."[153]

In *LePage's*, the plaintiff was in fact a less efficient competitor,[154] and the court, if it had cared more about total welfare than the welfare of consumers, would have allowed 3M to use bundled discounts to drive LePage's from the market. But the Third Circuit anchored its analysis in consumer protection, not economic efficiency. The court objected to 3M's pricing scheme because it was likely to force consumers to pay higher prices[155] and stated that 3M could justify the scheme only if it could show that it enhanced consumer welfare.[156] The court concluded that 3M had not done so. It realized few if any cost savings through its rebates and, thus, could not show that its price cuts were cost justified.[157] In the court's view, 3M's motivation must therefore have been predatory: "There is considerable evidence in the record that 3M entered the private-label market only to 'kill it.'"[158] One can quarrel with this diagnosis,[159] but it is difficult to say that the Third Circuit viewed the purpose of section 2 as enhancing total welfare.

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151. *Id*. (quoting *LePage's*, 324 F.3d at 179 (Greenberg, J., dissenting)).

152. 335 F.3d 1109 (10th Cir. 2003).

153. *Id*. at 1119; *see also id*. at 1118 (stating that a short-run profit-sacrifice test would "often result in injury to the consumer"). In *United States v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005), a section 2 case challenging exclusive dealing, the Third Circuit emphasized the adverse effect on consumers, not total welfare, of the defendant's monopoly power: "The picture is one of a manufacturer that sets prices with little concern for its competitors . . . . The results have been favorable to Dentsply, but of no benefit to consumers." *Id*. at 191.

154. *LePage's*, 324 F.3d at 177 (Greenberg, J., dissenting) ("LePage's economist conceded that LePage's is not as efficient a tape producer as 3M.").

155. *Id.* at 162–63 ("3M's exclusionary conduct not only impeded LePage's ability to compete, but also it harmed competition itself . . . . The District Court recognized this in its opinion, when it said: 'The jury could reasonably infer that 3M's planned elimination of the lower priced private label tape, as well as the lower priced Highland brand, would channel consumer selection to the higher priced Scotch brand.' . . . . The District Court thus observed, 'the record amply reflects that 3M's rebate programs did not benefit the ultimate consumer.'" (quoting LePage's Inc. v. 3M, No. Civ. A. 97-3983, 2000 WL 280350, at *7 (E.D. Pa. Mar. 14, 2000))).

156. *Id*. at 163 ("In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare." (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994))).

157. *Id*. at 164.

158. *Id*.

159. The most plausible alternative explanation is that 3M adopted the rebates because they increased its short run profits, eliminating any need for the company to raise prices later. The dissent notes that 3M continued to cover its costs, even after the rebates. *Id*. at 173 ("LePage's did not demonstrate that 3M's pricing was below cost (a point that is not in dispute).") (Greenberg, J., dissenting). As a result, if the rebates led to a substantial increase in 3M's sales, they would have raised its short-term profits. *See id*. at 179 ("3M's pricing structure and bundled rebates were not contrary to its economic interests, as they likely increased its sales.").

In *United States v. Microsoft*,[160] the most famous section 2 case in recent years, the D.C. Circuit ruled that the defendant's conduct should be evaluated under the rule of reason and formulated that standard in terms of effects on consumers, not total welfare.[161] The court stated that the plaintiff in a section 2 case must demonstrate that the monopolist's conduct had an anticompetitive effect: "That is, it must harm the competitive *process* and thereby harm consumers."[162] If the defendant establishes a procompetitive justification—some "form of competition on the merits,"[163] such as "greater efficiency or enhanced consumer appeal[164]—the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[165] The court did not say that proof of "competition on the merits" or "greater efficiency" would absolve the defendant of liability. To the contrary, the plaintiff may still prevail by showing that the harm caused by defendant's conduct exceeded its benefits. More important, the court did not indicate that the objective of the inquiry changes during the course of the litigation—that the plaintiff must show harm to consumers in order to establish its initial burden but then must show harm to total welfare to discharge its ultimate burden.[166]

Like many other cases, the Second Circuit's decision in *Trans Sport, Inc. v. Starter Sportswear, Inc.*,[167] recognizes the safe harbor for superior performance. But unlike numerous other cases, *Trans Sport* addresses the ultimate aim of the safe harbor. According to the court, its goal is to protect successful firms in order to advance the interests of consumers: "As we have consistently made clear, '[s]uccess alone is not enough to sustain an antitrust claim or the antitrust laws would have their greatest impact on the most efficient entrepreneurs and would injure rather than protect consumers.'"[168]

Many other cases acknowledge the safe harbor or state that exclusionary conduct can be saved from section 2 liability by proof of a business justification but do not discuss whether the conduct that merits the safe harbor or qualifies as a business justification must advance total welfare or the welfare of consumers.[169] In contrast, in *Brooke Group*, the Supreme

160. 253 F.3d 34 (D.C. Cir. 2001).

161. *See id.* at 58–59.

162. *Id*. at 58.

163. *Id*. at 59.

164. *Id*.

165. *Id*.

166. The court did indicate, earlier in its opinion, that "exclusionary acts . . . reduce social welfare, and competitive acts . . . increase it." *Id*. at 58. But when the court set forth the rule of reason that governs the legality of conduct under section 2, it did not mention total welfare.

167. 964 F.2d 186 (2d Cir. 1992).

168. *Id*. at 189 (quoting U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1359 (2d Cir. 1988)).

169. For recent cases recognizing the safe harbor, see W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 108 (3d Cir. 2010); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3rd Cir. 2007). For cases indicating that a legitimate business justification will protect conduct from section 2 liability, see Eastman Kodak Co. v. Image Technical

Court linked the safe harbor and "competition on the merits" to the interests of consumers in the relevant market.[170] As noted above,[171] the Court refused to condemn below-cost pricing in the absence of proof of recoupment, even though such pricing could reduce allocative efficiency because it lowers prices, raises consumer welfare, and generally is a "boon to consumers."[172] The Court also explained that when a firm excludes a rival through above-cost pricing, that may reflect "the lower cost structure of the alleged predator, and so represent[] competition on the merits."[173] But the Court did not say that such competition on the merits should be preserved because it increases productive efficiency and enhances total welfare. Instead, the goal of antitrust policy in this area is to provide consumers with "the benefits of lower prices."[174] Thus, even though above-cost price cuts may harm consumers, the Court stressed that they cannot be practically remedied without discouraging too much price cutting,[175] putting the emphasis on consumer impact, not efficiency.[176]

In the last two decades, in short, the case law under section 2 continues to uphold the safe harbor for superior performance or competition on the merits, but when judges have attempted to explain the rationale for this safe harbor, they have explained it in terms of consumer protection, not total welfare. While some decisions from an earlier era associated the safe harbor with Bork's book or the Areeda-Turner treatise[177]—both of which

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Servs., Inc., 504 U.S. 451, 483 (1992); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602–05 (1985). None of these cases, however, addresses the ultimate purpose of either the safe harbor or the business justification defense.

170. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

171. *See supra* notes 57–59 and accompanying text.

172. *Brooke Grp. Ltd.*, 509 U.S. at 224.

173. *Id*. at 223.

174. *Id*. at 224.

175. *See id*. at 223 (above-cost price cuts are "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting").

176. In *Verizon Communications Inc. v. Trinko*, 540 U.S. 398 (2004), Justice Scalia also emphasized customer benefit when he explained that compelling monopolists 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 . . . economically beneficial facilities." *Id*. at 407–08. He described an economically beneficial facility as "an infrastructure that renders [firms] uniquely suited to serve their customers." *Id.* at 407.

177. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 nn.32–33 (1985) (citing BORK, *supra* note 18, at 138 and PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b (1978)). Despite these citations, the Court's analysis gave much more weight to consumer protection than total welfare: it emphasized the adverse impact on consumers of the defendant's unwillingness to continue the four-mountain pass and never asked whether that decision might have promoted economic efficiency by reducing free riding by the plaintiff. *See* George L. Priest & Jonathan Lewinsohn, Aspen Skiing*: Product Differentiation and Thwarting Free Riding As Monopolization*, *in* ANTITRUST STORIES 229 (Eleanor M. Fox & Daniel A. Crane eds., 2007). Indeed, Priest and Lewinsohn believe that *Aspen Skiing* applied a consumer welfare standard and equated the efficiency of a practice with its impact on consumers:

> The Court sought in *Aspen Skiing* to apply the consumer welfare standard to Section 2 refusal to deal claims. According to the analysis, where a distribution practice is identified as efficient—which is to say, beneficial to consumers—and a

advocated economic efficiency as the overarching goal—the emphasis on aggregate efficiency has largely disappeared from recent cases. They remain concerned (perhaps overly concerned) with false positives, but this concern appears to be rooted in a desire to protect and encourage behavior, like price cutting and innovation, that benefits consumers, not a desire to further total welfare. In consequence, the case law under section 2 is now broadly consistent with the case law under section 1 of the Sherman Act and section 7 of the Clayton Act, both of which assign preeminence to consumer and small supplier protection.

3. The Consistency of Section 2 with the Other Antitrust Laws

The overarching goal of section 7 of the Clayton Act, as interpreted by the courts today, is to protect consumers from higher prices.[178] Mergers that are likely to lead to overcharges are never excused on the ground that they will enhance efficiency and improve total welfare.[179] Likewise, the ultimate aim of section 1 of the Sherman Act is to protect consumers and small suppliers from behavior that injures them.[180] It would be odd, given these identical goals, if the basic purpose of section 2 were not only different but different in a fundamental way—if section 2, unlike section 1 and section 7, elevated total welfare over consumer and small supplier protection.

Meese does not offer any reason why the fundamental purpose of the three major antitrust provisions should diverge. To the contrary, he appears to believe that their goals should be the same, suggesting that courts should

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> monopolist changes the practice without providing efficiency justifications, a Section 2 violation is proved.

Id. at 252.

178. *See, e.g.*, Herbert Hovenkamp, *Markets in Merger Analysis* 13 (Univ. of Iowa, Legal Studies Research Paper, No. 12-26, 2012), *available at* http://www.ssrn.com/abstract=1945964 ("Today there is little dispute about the proposition that the central concern of merger policy is to protect consumers from high prices that result from reduced output."); *id*. at 14 ("[C]ourts and enforcers [have] a set of merger concerns that claim broad assent—namely, to prevent consumer harm through higher prices."). In a buy-side case, the fundamental goal is to prevent mergers that are likely to depress the price that suppliers receive below the competitive level. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 65, § 12 ex. 24 (describing a merger to monopsony in the purchase of an agricultural product and indicating that it will "depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply").

179. *See* Kirkwood & Lande, *supra* note 53, at 225 (quoted *supra* at note 65); Herbert Hovenkamp, Distributive Justice and Consumer Welfare in Antitrust 4 (Aug. 3, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1873463 ("[C]urrent merger policy in the United States will generally not recognize a defense that although the merger increases the post-merger firm's market power and produces higher immediate prices, it will also produce efficiencies that are greater than the consumer losses. Rather, it must be shown the merger will not result in a price increase at all, even in the short run.").

180. *See generally* Hovenkamp, *supra* note 178, at 21 (identifying "the one thing that antitrust policy cares about most, namely, consumer welfare as measured by price and output"); Kirkwood & Lande, *supra* note 53; Meese, *supra* note 16, at 720 (stating that "under section 1 . . . courts focus on purchaser welfare").

adopt social welfare as the goal of section 1.[181] Nor does the legislative history or the case law supply any basis for different normative premises. To be sure, when Senator Hoar first articulated section 2's safe harbor for superior performance, he cast its rationale in terms of fairness rather than welfare and did not state that the safe harbor was needed to protect the interests of either consumers or society.[182] But, as noted earlier, the examples he gave of conduct that would and would not be protected by the safe harbor indicate that, if welfare were his concern, he cared more about the welfare of consumers than total welfare.[183] And this is consistent with the orientation of the legislative debates generally.[184] Their focus was on protecting consumers and small suppliers from anticompetitive conduct—conduct that takes their wealth without providing offsetting benefits—and nowhere did a senator or representative say that such conduct should be excused when it increases the efficiency of the economy.

C. When High Prices Benefit Consumers

Professor Orbach has pointed out two situations in which high prices may enhance consumer welfare. The first involves harmful products like cigarettes, where high prices, by discouraging consumption, tend to increase the well-being of consumers.[185] The second involves status goods, where high prices, by contributing to the prestige of the product, may raise its value for certain consumers.[186] In these situations, antitrust enforcement may actually reduce the welfare of consumers.[187] As explained below, however, neither situation requires a reformulation of the fundamental goal of antitrust because, as this Article makes clear, it is framed not in terms of maximizing consumer welfare but in terms of protecting consumers from anticompetitive conduct.

1. Harmful Products

The essence of anticompetitive conduct in a sell-side case is that it creates market power and extracts wealth from consumers without providing them with compensating benefits. Under that definition, a cartel

181. *See* Meese, *supra* note 16, at 735–36 ("Perhaps this Article's conclusions . . . should cause courts to reassess their apparent commitment to protecting purchasers instead of society in that small subset of cases governed by section 1.").

182. *See supra* note 37 and accompanying quotation.

183. *See supra* notes 39–43 and accompanying text.

184. *See supra* notes 18–46 and accompanying text.

185. *See* Orbach, *supra* note 3, at 152 ("The actual existence of bad [products that are harmful for consumers, despite their preference for them] suggests that low prices are not always good for consumers.").

186. *Id.* at 155 ("Some consumers . . . are willing to pay premium prices for certain branded goods, as long as these premiums buy them exclusivity and status.").

187. *Id.* at 152 ("[T]he application of antitrust laws in markets for bads to protect low prices is inconsistent with any coherent view of consumer welfare or social welfare."); *id.* at 156 ("[P]resent formulations of the antitrust consumer welfare goal appear to be inconsistent with common desires for status and exclusivity.").

of cigarette producers would be engaged in anticompetitive conduct and antitrust action that broke up the cartel would advance the fundamental goal of antitrust. Of course, by lowering prices, the antitrust case would encourage cigarette consumption and increase the likelihood of individual and public health problems, but those adverse effects on consumers and taxpayers could be avoided by raising the excise taxes on cigarettes. The potential benefits of a cartel, in other words, could be obtained through governmental action and the cartel itself would be unjustified. Whatever benefits it provided could be achieved through a less restrictive alternative. Indeed, the alternative is likely to be preferable, since self-interested cartel members are less likely than governments to set cigarette prices at the optimal level for public health.[188]

2. Status Goods

Some consumers derive satisfaction from the prestige or status value of an item, and the price of the item may add to its status.[189] In such cases, though, the producer does not engage in anticompetitive conduct when it introduces the product or sells it at a premium price. Rather, the firm is attempting to succeed in the marketplace by offering its customers what they want: an expensive status good. In consequence, if the firm is so successful that it achieves monopoly power, it is entitled to the safe harbor for superior performance. That result, however, would not be inconsistent with the fundamental goal of antitrust law: it would further it. Even though the firm has acquired monopoly power, it has provided its customers with a new product that they valued at the high price.

The analysis is more complicated if the firm not only charges a high wholesale price for the product but employs resale price maintenance to elevate its retail price. In that case, under the rule of reason applicable to vertical restraints,[190] the question is whether the vertical price fixing is justified—whether, in essence, the firm would be unable to furnish equivalent benefits to consumers without the downstream restraint. If the answer is yes, there would be no antitrust liability, and the result would

188. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 217b4 (3d ed. 2006) ("Whether more or less cigarette smoking is healthy or unhealthy is an important policy concern, but it is not one that is properly effected through the device of an unsupervised cartel agreement."). It is possible, of course, that price fixing by a cartel would achieve the optimal price level when, for some reason or other, excise taxes had not been set high enough. But this possibility is both too remote and too difficult for a court to evaluate to warrant an exception from the current per se ban on price fixing. *See* Meese, *supra* note 3, at 2234–35 ("[B]oth state and national governments already regulate tobacco quite heavily by means of warning labels, public service announcements, outright smoking bans and, most importantly, taxes justified on both revenue generation and regulatory grounds. For all we know, cigarettes and other forms of tobacco might be overregulated. Any court that sought to incorporate the reduction in such externalities as part of its evaluation of, say, a cartel of cigarette producers would take on a task worthy of the most zealous central planner.").

189. *See* John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 ANTITRUST BULL. 423, 451 (2010).

190. *See id.* at 424.

again be consistent with the ultimate goal of antitrust. Although the resale price maintenance might add to the firm's market power, the practice would provide consumers with benefits that could not be achieved in any other way.

CONCLUSION

The legislative histories of the major antitrust laws, the Sherman and Clayton Acts, leave little doubt that there were certain types of conduct that Congress wanted to prohibit and other categories that it wanted to protect. Congress plainly intended to stop competitors from combining into trusts or other arrangements that enhanced their market power and enabled them to charge higher prices. Such conduct, in the view of many senators and representatives, was a form of theft, since it allowed the perpetrators to take the wealth of consumers and transfer it to themselves. Likewise, Congress wanted to stop the same kind of behavior on the other side of the market—behavior that forced small suppliers like farmers and ranchers to accept prices below the competitive level, enabling powerful buyers to enhance their profits at the suppliers' expense. At the same time, Congress wanted to protect conduct that enhanced competition and benefited consumers and small suppliers. One senator, in a well-known statement, made clear that the Sherman Act should not condemn firms that were successful in the marketplace because they brought consumers better products or lower prices, even if they gained monopoly power as a result. It would be unfair to the firm, and harmful to its customers, if such desirable behavior were punished. But Congress's appreciation for efficient conduct did not extend to conduct that reduced costs but raised prices, since such conduct would diminish the well-being of consumers in the relevant market, not enhance it.

While Congress never expressed the overarching principle that ties these objectives together, that principle follows from the language and legislative histories of the antitrust statutes. These sources imply that Congress's most fundamental goal—its predominant purpose—was to protect consumers and small suppliers from anticompetitive conduct—conduct that creates market power, extracts wealth from consumers or small suppliers, and fails to provide them with compensating benefits.

The case law has now largely adopted this understanding. In the last two decades, it has almost completely abandoned any concern with protecting small business or reducing the overall concentration of power in society. Today, the courts recognize that the fundamental goal of antitrust is economic, not populist. With few exceptions, moreover, the courts now view that economic goal as protecting consumers and small suppliers from anticompetitive conduct, not increasing economic efficiency. While judges put great stress on not deterring procompetitive conduct, the kind of conduct they want to shield—to the extent that can be discerned—is conduct that is likely to benefit consumers and small suppliers, not conduct that will promote total welfare at their expense. Courts rarely express a desire to advance total welfare and have never excused a practice that caused overall harm to consumers or small suppliers in the relevant market on the ground that it would increase the efficiency of the economy.

This broad agreement on the ultimate objective of antitrust enforcement does not mean that every existing antitrust doctrine is ideal. Some legal standards, particularly in the area of exclusionary conduct by dominant firms, may underdeter anticompetitive conduct. But there is now a general understanding of what the ultimate aim of an antitrust legal standard ought to be.

The antitrust laws enjoy extensive popular and political support because this is their fundamental goal. Congress and the American people want an antitrust system that protects consumers and small suppliers from exploitative behavior—behavior that takes their wealth without providing them with offsetting benefits. As commentators and social scientists have noted, many people regard such exploitation as unfair.

A legal system with this overarching objective is also easier to administer. It is less complicated and less time consuming to pursue a single target in sell-side cases and a comparable target in buy-side cases than to determine whether total welfare would improve, even when consumers or small suppliers are likely to be hurt. The antitrust goal with the widest support, in short, is the goal of protecting consumers and small suppliers from anticompetitive conduct.[191]

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191. This Article has emphasized the economic benefits of an antitrust system that protects consumers and small suppliers from anticompetitive conduct. Such a system also has political benefits. By reducing unwarranted concentrations of power, it keeps political institutions more open, which in turn helps to preserve free markets. For a discussion of this virtuous circle, see ACEMOGLU & ROBINSON, *supra* note 29, at 323–24; *see also* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013); Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157 (2013).