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Whatever Did Happen to the Antitrust Movement?

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I. Introduction: Movement Antitrust

Antitrust in the United States today is caught between its pursuit of technical rules designed to define and implement defensible economic goals, and increasingly political calls for a new antitrust "movement." The goals of this movement have been variously defined as combatting industrial concentration, limiting the economic or political power of large firms, correcting the maldistribution of wealth, control of high profits, increasing wages, or protection of small business. None of those goals is new.[1] They have appeared and reappeared in the history of United States antitrust policy. Among the articulated goals of movement antitrust, low consumer prices often goes unmentioned.

In the 1960s the policy historian Richard Hofstadter lamented the passing of the antitrust "movement" as one of the "faded passions of American reform."[2] In its early history, he observed, antitrust had a powerful movement quality but very few accomplishments in the courts. Later, it ceased to be a movement just as it was attaining litigation success. Hofstadter's essay appeared in his book *The Paranoid Style in American Politics*.[3] He later explained that title as invoking "the sense of heated exaggeration, suspiciousness, and conspiratorial fantasy" that characterized

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[1]For example, the history of anti-concentration rhetoric is voluminous and more than a century old. *See* William E. Kovacic, *Failed Expectations: the Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1988). On the early history, *see* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS (1988); HANS THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 54-96, 235-308 (1955). Louis Brandeis spoke forcefully about these issues. *See* his papers dating back to the 1912 Presidential election, collected in LOUIS BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPER OF LOUIS BRANDEIS (Osmond K. Fraenkel, ed. 1934).

[2] Richard Hofstadter, "What Happened to the Antitrust Movement," in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS (1964). The essay is reprinted in THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES (Daniel A. Crane & Herbert Hovenkamp, eds., 2013). Hofstadter's essay originally appeared in THE BUSINESS ESTABLISHMENT (Earl F. Cheit, ed. 1964).

[3] HOFSTADTER, *supra*, note 2.

movement politics in the United States.[4] Antitrust was no exception.

At about the same time, Robert H. Bork and Ward Bowman published another well known essay addressing many of the same issues, although from a different perspective. In "The Crisis in Antitrust"[5] they complained that antitrust was forever "vacillitat[ing] between the policy of preserving competition and the policy of preserving competitors from their more energetic and efficient rivals."[6] The result, they argued, was a haphazard mix of intelligent rules governing practices such as naked price fixing, together with senseless overly aggressive rules against exclusionary practices,[7] and even condemning mergers simply because they produced cost savings.[8]

Bork borrowed heavily from this article when he wrote *The Antitrust Paradox*, which was published a little over a decade later.[9] There he noted antitrust's very considerable rhetorical popularity,[10] but along with it a lack of fundamental understanding of antitrust law's economic purpose and effects, even among its practitioners.[11] At the same time he observed that "[t]here has always existed in this country a populist hostility to big business, a hostility that is currently reinforced by the suspicion that major corporations are somehow to blame for hardships that have their origin elsewhere…."[12]

Hofstadter's, Bowman's and Bork's observations capture one of antitrust law's most enduring disconnects. On the one side is its "movement" quality, reflected by politicians and popular media as an appeal for a stronger and broader set of antitrust rules that are better able to serve the American economy's various constituencies. Often movement participants lack a serious understanding of economics and have wildly unrealistic expectations about what competition policy can accomplish, as well as inconsistent and

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[4] *See* Richard Hofstadter, *The Paranoid Style in American Politics*, HARPERS (archive,Nov., 1964), available at https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/.

[5] Robert H. Bork and Ward S. Bowman, *The Crisis in Antitrust*, 65 COL. L. REV. 363 (1965). The article was based on an essay that initially appeared in *Fortune* magazine: Bork and Bowman, "The Crisis in Antitrust," FORTUNE 138 (Dec. 1963).

[6] Bork and Bowman, *id*., 65 COL. L. REV. at 363-364.

[7] Id. at 366.

[8] Id. at 370.

[9] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978). Bork even borrowed some phrases from the earlier article. For example, Bork and Bowman referred to "the crash of antitrust merger" policy in the 1960s, referring mainly to the *Brown Shoe* decision. Bork and Bowman, *supra* note 5 at 370. That became the title of Chapter Nine of THE ANTITRUST PARADOX, 198-216.

[10] *Id*. at 3.

[11] *Ibid*.

[12] *Id*. at 5.

even incoherent goals. Often accompanying this is considerable distrust and paranoia, much of it leveled at big business.

On the other side are antitrust's much duller technical rules, driven by concerns for due process, economic efficiency, administrability, and testability. In contrast to the antitrust movement, Richard Hofstadter observed, "the antitrust enterprise, as an institutional reality, now runs its quiet course without much public attention, and we lost sight of it…." He lamented that "in the very years when it lost compelling public interest the antitrust enterprise became a force of real consequence in influencing the behavior of business."[13]

While Hofstadter, Bork and Bowman might all seem like so much ancient history, their characterization of antitrust's dilemma is particularly relevant today. If anything, it more accurately describes the situation in the twenty-first century than it did when they were writing. Over the last fifty years antitrust has become much more technical, particularly in areas such as merger enforcement and exclusionary behavior, but also in more collateral areas such as assessing causation and measuring damages. As its technical competence has increased, its "movement" quality has faded into the background or become political noise. Simultaneously, technical antitrust has become less interesting to politicians, who cannot win elections by talking about the Herfindahl-Hirschman Index or average variable cost.

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.[14]

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[13]Hofstadter, *Antitrust Movement*, supra note 2 at 190.
[14]*See* discussion *infra*, text at notes 46-48.

Nevertheless, mantras such as "industrial concentration" or "big business" have great political force. These terms provide almost nothing in the way of administrable rules while yet evoking an image of something big, bad and powerful that government must bring under control. For example, here is the plank of the 2016 Democratic Party's platform on antitrust:

> **Promoting Competition by Stopping Corporate Concentration**
>
> *Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction. We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy.*
>
> *We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama's recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.*[15]

The antitrust plank never references low consumer prices, or anything having to do with product quality. That is not because Democrats are not interested in low consumer prices.[16] Rather, the references to prices occur in other sections of the Platform, devoted to such subjects as Health and Safety and the high price of pharmaceutical drugs. Those sections make no

[15] 2016 Democratic Party Platform 10 (2016), available at https://www.democrats.org/party-platform.

[16] *Cf*. Elizabeth Warren, "“Reigniting Competition in the American Economy” Keynote Remarks at New America's Open Markets Program Event", Speech given on June 29, 2016, available at https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf. However, Senator Warren expresses a strong concern about consumer prices and product and service quality. Id. at 2.

reference to antitrust law.[17] The only references to "consumers" occur in planks pertaining to unionization, affordable housing, Wall Street, banks and Dodd-Frank, and clean energy.[18] So according to the Platform, while legal policy generally is concerned with high consumer prices, antitrust policy apparently is not. By contrast, the 2016 Republican platform never references antitrust at all, although it does contain a plank promoting a "competitive America," but focused entirely on lowering tax rates.

The antitrust plank in the 2016 Democrat platform is actually one of the most detailed to appear in any platform by a major political party.[19] The catch phrases that it uses, however – "corporate concentration," "unfairly limiting competition," or "abusive behavior by dominant companies" – can mean practically anything depending on assumptions. More painfully, there is no suggestion in this statement that antitrust has anything to do with low prices, high output, high product quality, or innovation. The platform is peppered with references to "fair" or "fairness," including the antitrust plank, but with no reference point indicating how fairness should be assessed. Is it "fair" that consumers be asked to pay high prices in order to accommodate the shortcomings of some businesses; or conversely, is it "fair" that small businesses suffer simply because they are not able to compete with larger firms on price or quality; or "fair" that firms heavily invested in old brick-and-mortar distribution lose out to more technologically entrepreneurial firms? "Fairness" as an antitrust concern means nothing without a reference point or set of measurement tools.

As for specific practices, the antitrust plank in the Democrat platform singles out "tying arrangements, price fixing, and exclusionary conduct," saying nothing about mergers, other vertical restraints, or anticompetitive patent practices. In fact, the Platform never mentions patents, although it makes frequent references to innovation, largely in the context of proposed government intervention to stimulate production[20] or to finance R & D and educate people for more technically demanding jobs.[21] Of the three anticompetitive practices that it singles out, "price fixing" is completely uncontroversial and has always been a central focus of nearly every

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[17] *2016 Democratic Platform, supra* note 15 at 30, 31

[18] *Id*. at 4, 5, 10, 24.

[19] The full text of major party platforms back to 1840 can be found at http://www.presidency.ucsb.edu/platforms.php. For a history of antitrust planks in major party platforms, see "The Monopoly Issue in Party Politics," CQ Researcher, available at http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1936070700.

[20] *E.g.*, *Democratic Platform, supra* note 15 at 6 (stimulating a "manufacturing renaissance"), p. 11 (innovation and trade agreements)

[21] *Id*. at 7, 31, 32 (innovation and universal health care; reducing drug costs).

articulation of antitrust policy, left, center, and right – including Bork's *Antitrust Paradox*.[22] The term "exclusionary conduct" is so vague that it is meaningless. Both socially harmful and socially beneficial conduct can be "exclusionary." The inclusion of "tying arrangements" is mystifying. Tying is ubiquitous in modern economies and is an essential characteristic of networks and technology.[23] Further, the vast majority of it is procompetitive because it increases output without excluding anyone. Finally, the number of antitrust tying cases is small in comparison with merger cases, which make up a large portion of antitrust enforcement activity. A major party platform that identifies "tying arrangements" but not "mergers" as a fundamental concern requires an explanation. Most importantly, it seems to miss the whole point of competitive markets, which is to produce a high output of quality, competitively priced goods.

At least in part, the Democratic Party platform reflects the reappearance of movement antitrust. While it is hardly the only expression, and certainly not the most extreme, it represents a troublesome development – namely, the idea that America needs higher prices in order to give smaller firms a fair chance. The Platform also gives a reader the strong impression that its slogans were selected in order to achieve maximum political traction with the *illiterati*, and perhaps that is all that can be expected of a political platform. In the process, however, it does antitrust policy a great disservice by making its legitimate targets almost impossible to define and not providing ammunition for attacking them when they are defined.

Movement antitrust argues variously for abandoning the measurement of competition by reference to output and price,[24] or even abandoning consumer welfare as an antitrust proscription altogether.[25] It accuses retailers such as Amazon of engaging in "predatory pricing" without providing a coherent definition of the practice.[26] It never explains how a

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[22] BORK, ANTITRUST PARADOX, supra note 9 at 66-67, 292-295.

[23] See Herbert Hovenkamp, *Antitrust and the Design of Production*, ___ CORNELL L. REV. ___ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013122.

[24] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 712 (2017). *See also* Maurice Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARVARD BUSINESS REVIEW (Dec. 15, 2017), available at https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement; and David Dayen, *The Rehabilitation of Antitrust*, THE AMERICAN PROSPECT (Dec. 22, 2017), available at http://prospect.org/article/rehabilitation-antitrust.

[25] See, e.g. Barry Lynn, *Testimony before the Senate Committee on the Judiciary: Subcommittee on Antitrust, Competition, and Consumer Rights* (Dec. 13, 2017), available at https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf (no page numbers).

[26] Khan, *supra* note 24 at 722-724; id. at 753 (preferring growth over profits is

nonmanufacturing retailer such as Amazon could ever recover its investment in below cost pricing by later raising prices, and even disputes that raising prices to higher levels ever needs to be a part of the strategy, thus indicating that it is confusing predation with investment.[27] Charging low but profitable prices indefinitely is not unlawful "predatory pricing"' nor is forcing suppliers to price competitively.

Movement's antitrust attack on "consumer welfare" reflects both a misunderstanding of that term, and an exaggeration of its influence on recent antitrust jurisprudence. This point is critical because much of movement antitrust blames the "consumer welfare" principle for the current state of antitrust law. "Consumer welfare" as it is properly used today refers to the welfare of consumers-as-consumers, pure and simple.[28] Speaking objectively, consumer welfare is improved by high output and low prices, as well as high quality. Under this definition the welfare of producers, competitors or anyone other than consumers who might be affected by a practice is ignored. In addition to its substantive advantages, this principle has a powerful administrative advantage: it does not require courts to compute welfare "tradeoffs," because there is nothing to trade off.[29]

In sharp contrast, Robert Bork very famously used the term "consumer welfare" when he was really referring to the combined welfare of both producers and consumers.[30] He observed that an economic "tradeoff" occurs when a supplier practice causes monopolistic increases in consumer prices but also reduces the supplier's costs.[31] Most peculiarly, for Bork the word "consumer" referred to suppliers as well as customers.[32] For Bork, a practice that generated $100 in seller profits but buyer losses of $60 would be counted as a net improvement of "consumer welfare." Bork also believed,

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a form of predatory pricing); *id.* at 759 (suggesting that loss leader pricing is a form of predatory pricing).

[27] *Id*. at 739-730.

[28]*See* Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: the True Consumer Welfare Standard*, 22 LOYOLA CONSUMER L. REV. 336 (2010).

[29] See Hovenkamp, *The Rule of Reason*, __ FL. L. REV. __ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885916; Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 719-726 (2017).

[30]*See* Salop, *Real and Proper*, *supra* note 28. For an illuminating discussion of Bork's use of the term, see Daniel A. Crane, *The Tempting of Antitrust, Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 845-848 (2014).

[31]BORK PARADOX, *supra* note 9, 107.

[32]*Id*. at 108, observing that "consumers" have both suffered from "lost output" but have also "gained in resource saving" from the cost reduction; however the latter gains accrue to the producers, not to the purchasers.

however, that actual computation of welfare tradeoffs in individual cases would be too difficult. Further, an attempt to do so would overlook important efficiencies. Rather, efficiencies should be presumed, even when the challenged practice creates market power.[33] That presumption of efficiency without proof is one of the most controversial aspects of Bork's approach to the welfare question.

These two understandings of consumer welfare have produced a troublesome ambiguity in antitrust law ever since. For example, some of those who write in movement antitrust today attribute the "consumer welfare" principle to Bork,[34] and as a result blame it for higher prices that accrue to producers. But the important thing is that high producer profits for Bork was part of the "consumer welfare" that antitrust law should produce.

This ambiguity about definition has also affected Supreme Court usage of "consumer welfare." The Supreme Court has never categorically embraced any particular definition of consumer welfare, even though it has used the term several times. Five majority opinions speak of consumer welfare. Two were quotations from Bork's *Paradox*, suggesting that the Court was either speaking of producer welfare as well, or else that it did not understand the difference between Bork's definition and true consumer welfare.[35] Plaintiffs won both cases, however, and the holdings are consistent with true consumer welfare. Indeed, in one of them, *Reiter v. Sonotone Corp.*, the Supreme Court held that end use consumers had standing to pursue price fixing, making it the ultimate consumer welfare decision.

Of the remaining three uses, two were in predatory pricing cases observing that "consumer welfare" would be enhanced by a period of below cost pricing that was not followed by recoupment of losses through subsequent higher prices.[36] That would very likely be true. An unsuccessful attempt at predatory pricing would result in lower consumer prices temporarily, but no later period of high prices. The final use of "consumer

[33]*Id*. at 107-110, 128-129.

[34]E.g., Barry Lynn, *Testimony*, *supra* note 25; and see David McLaughlin, *Forget Consumer Welfare. This Antitrust Movement Targets Power Instead* (Bloomberg Business Week, Jan. 17, 2018), available at https://www.bloomberg.com/news/articles/2018-01-17/forget-consumer-welfare-this-antitrust-movement-targets-power-instead.

[35]Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (granting standing to consumers in price fixing case) (quoting BORK, PARADOX, supra note 16, 66); NCAA v. Board of Regents, 468 U.S. 85, 107 (1984) (condemning output restriction under rule of reason; quoting *Reiter*).

[36]Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 324 (2007).

welfare" is from *Leegin*, concluding that some instances of RPM may promote consumer welfare.[37] That could also be true under either definition of consumer welfare.

Four additional usages of the term are in dissents.[38] Finally, the term appeared in Justice Brennan's concurring opinion in the Hyde vs. Jefferson Parish tying case. Justice Brennan observed that some ties could impair horizontal competition, injuring consumer welfare.[39] A few other cases never use the phrase "consumer welfare" but do speak more generally about benefits to consumers.[40] None of these Supreme Court decisions distinguish the Bork definition of consumer welfare from the true consumer welfare position. Beyond the Supreme Court, the strongest case for application of a consumer welfare principle is in merger law under the Horizontal Merger Guidelines, which expressly embrace a consumer welfare principle to the extent that they tie merger policy to the effect on output and consumer prices.[41]

One of the most disturbing things about movement antitrust is its indifference or even disparagement of low consumer prices. Without citing any evidence, some of its protagonists proclaim that most Americans are not

[37]Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007).

[38]Eastman Kodak Co. . Image Tech. Serv., Inc., 504 U.S. 451, 487 (1992) (Scalia, j., dissenting, observing that per se rule against tying condemns them without inquiry into consumer welfare); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 361 (1990) (Stevens, j., dissenting) (accusing majority of rejecting consumer welfare); Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 367 (1982) (Powell, j., dissenting) (per se rule against maximum price fixing contrary to consumer welfare); FTC v .Actavis, Inc. 133 S.Ct. 2223, 2239 (Roberts, C.J., dissenting) (contrasting consumer welfare concerns of antitrust with limited monopoly created by patent laws).

[39]Jefferson Parish Hosp. Dist. V. Hyde, 466 U.S. 2, 45 (1984) (Brennan, concurring). In addition, Justice Breyer used the term in one non-antitrust case, although he was referring to antitrust. Kirtsaeng v. John Wiley & Son., Inc., 568 U.S. 519, 539 (2013) (copyright exhaustion case; purpose of antitrust policy is to maximize consumer welfare).

[40]*See* Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 770 (1984) (centralized management can benefit consumers); United States v. Philadelphia National Bank, 374 U.S. 321, 367-368 (1963) (anticompetitive mergers can reduce consumers' alternatives); State Oil Co. v. Khan, 522 U.S. 3, 14 (1997) (some uses of maximum RPM can benefit consumers). *See also* United States v. Topco Assocs., Inc., 405 U.S. 596, 624 (1972) (Burger, C.J., dissenting) (accusing majority's decision of being detrimental to consumers).

[41]U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines §§1, 6, 7, 9, 10 (2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

concerned with high prices that might result from monopoly, but rather with "loss of their properties, hence their independence, even their dignity."[42] They recommend harsh rules against vertical integration without ever stating a test, other than a very general suggestion that vertical integration leads to leveraging and foreclosure.[43] They call for a return to the merger enforcement standards expressed in the 1968 Merger Guidelines – for example, blocking any merger between a firm with 15% of a market and any other firm whose market share is 1% or more. The relevance of these numbers is not apparent, other than suggestions that firms are too big.[44] Clearly, high prices are not the target, for the movement's proponents denigrate the importance of prices to merger analysis – for example, objecting to the fact that, while the 1968 Guidelines were not particularly focused on consumer prices, Guidelines issued in the 1980s and after were. Indeed, low prices appear to be the enemy that antitrust must combat.[45] Movement protagonists argue in favor of resale price maintenance, not in order to promote lower cost distribution, but rather to protect less efficient retailers' higher margins from "predatory pricing" – without any evidence of a type of predatory pricing that resale price maintenance could facilitate.[46] They enthusiastically embrace Louis Brandeis' repeated arguments that "price cutting" is in fact "the most potent weapon of monopoly – a means of killing the small rival."[47] Much of the resale price maintenance that Brandeis supported occurred at the behest of dealer cartels who forced suppliers to use RPM as a way of disciplining price cutters.[48]

Certainly, big business can cause harm to the lives of Americans in other ways than through competitive pricing. But these ways need to be articulated, supported by evidence, and then sorted into those things that are conceivably within the domain of antitrust and those that are not. Promiscuous application of the antitrust laws so as to make big firms smaller and prices higher could cause irreparable harm, not only to consumers, but to the entire economy.

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[42]Khan, *supra* note 24.

[43] *Id*. at 733-734.

[44] *Ibid*.

[45]Lynn, *supra* note 25 (objecting that the word "price" appears far more frequently in the 1984 Guidelines than it did in the 1968 Guidelines.) The testimony writes about the 1984 Guidelines as if they were the current ones.

[46]Khan, *supra* note 24 at 723-724.

[47]*Ibid*., quoting Louis D. Brandeis, *Competition that Kills* (HARPERS WEEKLY, Nov. 15, 1913), available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-15.

[48]*See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 at 331-348 (1991).

In addition, the idea that Americans are unconcerned about low prices cannot simply be asserted. It needs to be tested. Most obviously, it conflicts with actual consumer behavior. Within the vision of movement antitrust, Amazon is a menace because it makes so many sales – and all of these to consumers who apparently do not want low prices. My own instinct is that if a goal of supporting higher prices in order to benefit competing businesses were communicated clearly, it would be a political disaster. Small business represents an important part of the economy, but everyone is a consumer. Further, people in the lower two-thirds of the economic distribution are particularly sensitive to price. So to the extent that it is Democrats that are supporting this antitrust war on low prices, they are harming their own constituencies. More objectively, embracing an ideology of supporting lower output and higher prices would be a disaster for the American economy, which is in much fiercer competition with other world economies than it was in the mid-twentieth century when Hofstadter, Bowman and Bork were writing.

The antitrust *cognoscenti* may not take movement antitrust arguments seriously, regarding them as economically ill informed, untested, excessively rhetorical, incoherent, or paranoid. But the *cognoscenti* control neither political parties nor ballot boxes. The danger that the political process will force government policy off the rails is real. It would hardly be the first time that a political party pursued the ideology of an extremist minority at the expense of its true constituency.

II. Technical Antitrust

Uncovering the many inconsistencies and weaknesses of movement antitrust is easy. But technical antitrust has its own shortcomings. "Technical antitrust" refers to a set of antitrust rules that begin with a picture of some best set of social circumstances reasonably achievable through the antitrust laws. Then it relies on experts to develop an approach that tries to give effect to them, consistent with the substantial limitations of the institutions that make antitrust policy. The goals are coherent, although the means of attaining them can be controversial. For example, chief among them in United States antitrust policy is some conception of economic efficiency, procedural due process, and federalism. In some circumstances efficiency and either due process or federalism trade against each other.[49] The consumer welfare principle is a prominent example of technical antitrust, but so are more general welfare tests such as Bork's proposal that includes producer welfare, or others that might include aggregate social welfare.

Both technical antitrust and movement antitrust suffer from

[49] *See* discussion *infra*, text at notes 186-190.

weaknesses, making each prone to sharp criticism from the other side. Technical antitrust often appears to be underdeterrent because of its insistence on due process and rationality, administrability and clear proof.[50] By contrast, movement antitrust often makes claims that are impossible to deliver, or adopts speculative, unprovable theories about competitive harm. As a result, movement antitrust tends to be overdeterrent, certainly when tested by the goals of low prices or economic efficiency.[51] Technical antitrust typically sees optimal policy as driven by the market, while movement antitrust is more responsive to political concerns. Technical antitrust is concerned about testability of antitrust rules, although it must confront the fact that testing is sometimes difficult.[52] Movement antitrust appears to be completely unconcerned with testability.

The legitimate concerns of antitrust law must be driven by some conception of what citizens are entitled to expect from business and their economy. Further, antitrust law is only one of many legal policies that address this concern. Antitrust law's principal concern is with market power and not with political power as such, although political power may become relevant when it becomes a path to the creation of market power and in ways that antitrust is competent to address. This occurs mainly when politicians delegate the control of governmental machinery to self-interested private parties. Even this overstates the case for antitrust control over political power. The fact is that the Constitution as well as other institutions of government often serve to immunize economically harmful political activity that might otherwise be actionable under the antitrust laws.[53] Most obviously, interest group capture represents uses of political power to obtain outcomes that are economically harmful, in the sense that they cause unjustified high prices or unreasonably limit competitor access to markets.[54]

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[50] *E.g.*, Khan, *supra* note 24 at 710-711 (associating consumer welfare principle with excessive focus on short run concerns).

[51] *See* Carl Shapiro, *Antitrust in a Time of Populism* (Oct. 24, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345

[52] *See* discussion *infra,* text at notes 266-268.

[53] For example, this is the effect of the *Noerr-Pennington* doctrine, particularly when the issue pertains to successful lobbying of legislative bodies. *See* Eastern Rd. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961) (antitrust immunity for firms that lobbied for an anticompetitive regulatory provision designed to benefit railroads and harm truckers); *and see* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶201-203 (4th ed. 2013).

[54] Contrast the decisions in North Carolina State Bd. Of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015) (striking down state sanctioned, privately enforced exclusionary conduct, permitting only licensed dentists to whiten teeth, under the antitrust laws); and Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015) (immunizing the same conduct, when publicly enforced, from Equal Protection

The consumer welfare principle has also been criticized for focusing unnecessarily on the short run.[55] That criticism is misplaced. In fact, any antitrust policy that is concerned with rational fact finding and due process will find many long run concerns to be unmanageable. The history of predatory pricing law illustrates the problem. There is widespread agreement among economists that welfare-reducing strategic pricing is possible in situations involving dominant firms. In the long run these strategies lead to lower output and higher prices than would prevail under more competitive conditions. Further, modeling some of these situations is not difficult.[56]

But the models are for the most part existence theorems. An antitrust court has the much more difficult task of looking at a set of practices and ruling out harmless alternative explanations.[57] Further it must be able to do this by means of a rational, defensible process that gives firms notice of what they can and cannot do, and then provides a defensible remedy. For example, so-called "limit" pricing is a strategy in which a dominant firm, typically in an industry with high fixed costs, sets a price below its short-run profit maximizing price but high enough to either exclude rivals or limit their growth.[58] An antitrust court assessing such a situation would have to

attack). On the "state action" doctrine, *see* the discussion *infra*, text at notes 186-190.

[55]*See* Khan, *supra* note 24 at 710-711.

[56]*See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶736-737 (4th ed. 2015) (summarizing long run pricing strategies).

[57]A good example is E. I. du Pont de Nemours & Co., 96 F.T.C. 653 (1980). The FTC declined to proceed against an above cost exclusionary pricing practice after a lengthy investigation. DuPont developed a very efficient mechanism for producing titanium dioxide which required a large scale. It then allegedly built a much larger plant than needed to meet market demand, simply to hold out its excess capacity as an entry deterrence device. The Commission concluded that based on the facts presented it was impossible to distinguish this conduct from competitive behavior, concluding:

> [T]he essence of competitive process is to induce firms to become more efficient and to pass the benefits of the efficiency along to consumers. That process would be ill-served by using antitrust to block hard, aggressive competition that is solidly based on efficiencies and growth opportunities, even if monopoly is a possible result.

Id. at 747. On the theory, *see* Oliver Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 YALE L.J. 284 (1977).

[58]3A AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 56, ¶736. For alternative models, *see* Robert E. Hall, *Potential Competition, Limit Pricing, and Price Elevation from Exclusionary Conduct*, 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 433-440 (2008).; Richard J. Gilbert, *The Role of Potential Competition in Industrial Organization*, J. ECON. PERSP. 107

determine the "correct" price, and perhaps even order the firm to increase its already profitable price even further in order to permit entry.

By contrast, the Areeda-Turner test for predatory pricing, which currently dominates in the federal courts, is limited to "non-sustainable" short-run strategies. Its success among the courts owes to the fact that – notwithstanding its own technical difficulties – it is much closer to being rationally administrable than any of the long run alternatives.[59] The limitation is decidedly not a function of the consumer welfare principle, however. It is driven entirely by fact finding limitations on courts and the Constitutional requirement of rational decision making supported by evidence.

Hofstadter's observation that technical antitrust has largely become invisible to the public remains apt. The appeal of movement antitrust is that it invokes images calculated to get the public more excited about antitrust. At one level, of course, awareness is a good thing, but public awareness is not the same thing as rational decision making. Antitrust is an excellent example of why the American Constitutional system is a republic and not a direct democracy. This entails two things. First, the Constitution places limits on how far the public can go in threatening property, contract, and liberty rights, as well as the extent to which citizens are entitled to reasonable and rational public decision making. Second, the principal role of citizen voters is to elect governing officials, entrusting them to act wisely in the making and administration of technical rules of law. Ever since Alexander Hamilton's role as the new government's financial manager, our Constitutional republic has relied on appointed experts to make decisions. In our more complicated society we use them more, but they are hardly an invention of the twenty-first century or, for that matter, even the New Deal.

Has antitrust's increasing pursuit of technical rules made the discipline dull or, more importantly, irrelevant or ineffective? Or is technique simply a way for antitrust to make rational rules within its area of competence, leaving other economic questions to different parts of government? One clear consequence of pursuing technical antitrust rules is that the range of problems that antitrust is competent to address becomes narrower.[60] Another is underdeterrence. Relevant underdeterrence is not the same thing as incorrect outcomes. In a world where rules are imperfect and

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(Summer, 1989); PAUL A. GEROSKI, MARKET DYNAMICS AND ENTRY (1991).

[59] *See* Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal*, 46 REV. INDUS. ORG. 209 (2015). For an argument that above cost limit pricing should be challengeable under the antitrust laws, *see* 1 RICHARD S. MARKOVITS, ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW 517-518 (2014).

[60] *See* discussion *infra*, text at notes 205-206.

decision making institutions (such as jury trials) even moreso, a certain number of incorrect outcomes is to be expected. But these outcomes should be more-or-less randomized, producing a balance of false positives and false negatives. By contrast, underdeterrence occurs when a substantive or procedural rule systematically fails to recognize and remedy a particular type of harmful practice.

The claim that technical antitrust is underdeterrent has some traction. Because plaintiffs usually have the burden of proof and defendants are entitled to due process, uncertainties are often resolved in favor of defendants. When uncertainties loom large, as they often do in antitrust cases, this naturally invites the critique that antitrust rules in complex areas produce too many false negatives. Here again, predatory pricing provides a good example. The two leading schools of technical antitrust -- classic Chicago and the Harvard School after 1975 -- take quite different approaches.[61] The orthodox Chicago School simply assumed that predatory pricing was so irrational that it should always be lawful.[62] By contrast, the Harvard approach never made such strong claims. Rather, it assumed that the conditions and practices producing anticompetitive outcomes are uncommon and require clear proof based on objective criteria. The Supreme Court has nearly always followed the Harvard approach.[63] Nevertheless, results do not differ all that much. Under existing predatory pricing law plaintiffs rarely win cases.

The same thing is a little less true for vertical practices, including vertical mergers. Historically, the Chicago School believed they should be virtually per se legal, with a narrow exception for vertical practices that facilitate horizontal collusion.[64] The Harvard School, by contrast, believed that competitive harm from purely vertical practices was uncommon but still possible, and preferred subjecting them to the rule of reason. Once again, the Supreme Court has generally followed the Harvard approach,[65] and the antitrust Agencies continue to have an active vertical merger enforcement policy.[66] Here the story is a little different than for predatory pricing.

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[61] See discussion infra, text at notes 77-79.

[62] *E.g.*, BORK, ANTITRUST PARADOX, *supra* note 9 at 144-148; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 UNIV. CHI. L. REV. 263 (1981).

[63]*See* discussion *infra*, text at notes 92-97.

[64]*See* discussion *infra*, text at notes 102-151

[65]*Ibid.*

[66]*See*, *e.g*., Complaint, ¶¶5-6, United States v. AT&T, Inc., Case 1.17-cv-02511 (D.D.C., Filed Nov. 20, 2017) (challenging vertical merger between internet/cable provider and program provider). *See also* D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC* (Jan. 10, 2018), available at https://www.ftc.gov/public-

Defendants do occasionally lose vertical cases, but not that many, and the proof requirements are stringent.[67] When they do lose them, foreclosure rather than facilitation of collusion is usually the reason, indicating that the Harvard School dominates in this area.

In very sharp contrast, movement antitrust makes expansive claims about these practices that are technically undisciplined, untestable, and even incoherent.[68] Movement antitrust claims are lodged, variously, against absolute size, industrial concentration, high prices, leverage, and unspecified injury to small business. Little in the way of administrable rules has thus far emerged – at least if one insists on a provable link between a given practice and competitive injury.

Much of the discrepancy between movement antitrust and technical antitrust results from the sparse language of the principal antitrust laws. The Sherman Act in particular speaks with expansive breadth about restraints on trade or monopolization, without giving those terms any definition. The Clayton Act is a little more precise, addressing price discrimination,[69] tying and exclusive dealing,[70] and mergers.[71] But the relevant effects language, "substantially lessen competition" or "tend to create a monopoly," is so general that it can mean practically anything. Indeed, the same statutory language was used in the *Brown Shoe* merger case to condemn the low prices that result from a merger,[72] while today it reaches only mergers that threaten higher prices.[73] That opacity was very likely intended, because the Clayton Act has a statutory dictionary which defines "antitrust laws," "commerce," and "person," but does not define "competition" or "monopoly."[74] No wonder that some people peering into the antitrust laws come to wildly different conclusions about what they can do.

The expansive, vague language of the antitrust laws also gives rise to the feeling that the antitrust laws can do all things for all people, and over the

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statements/2018/01/vertical-merger-enforcement-ftc (noting that the Agencies challenge between 30 and 40 horizontal mergers per year and about one vertical merger per year).

[67]Examples of government victories include United States v. Dentsply Intern., Inc., 399 F.3d 181 (3d Cir. 2005); McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015); United States v. Microsoft Corp., 253 F.3d 34 (D.C.Cir. 2001). *See also* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012) (private plaintiff victory).

[68]*E.g.*, Khan, *supra* note 24 at 731-736 (on vertical integration).

[69] 15 U.S.C. §13.

[70] 15 U.S.C. §14.

[71] 15 U.S.C. §18.

[72] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[73]See, e.g., U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (2010), supra note 41.

[74] 15 U.S.C. §12.

decades that is precisely how some constituencies have viewed them. Movement antitrust has always found this ambiguity attractive because it enables its protagonists to pursue an agenda without having to go to a Congress that is likely to be unsympathetic. Attaining wealth equality, combatting structure for its own sake, or strengthening the power of employees is far more effectively done legislatively, but only if Congress is minded to act.[75]

III. Technical Antitrust: Goals, Sources, and Limitations

Technical antitrust today comes mainly from the Harvard and Chicago Schools, which started in different places but began to converge in the late 1960s and 1970s.[76] Where the two schools have differed, the Supreme Court has usually followed the Harvard approach. As a result, the work of Bork, Bowman, Posner, Easterbrook and other Chicago Scholars needs to be placed in perspective, although Posner was also a renegade who departed from Chicago School orthodoxy more than the others. In general, the Chicago School proposals were more laissez faire than Harvard School approaches, calling for less antitrust intervention. Specific Chicago School recommendations generally obtained more traction in the academic literature than in the case law.

Speaking very generally, the policy changes that gave rise to current antitrust policy occurred mainly in the late 1970s and 1980s. During that period antitrust became less interventionist, more responsive to then current economic theory, and – gradually -- more concerned about benefitting consumers rather than competitors or others. The late 1970s witnessed the production of some remarkable, highly influential books, including Richard Posner's original *Antitrust: An Economic Perspective* (1976)[77]; Bork's *Antitrust Paradox* (1978)[78]; and the first five volumes of Areeda and Turner's

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[75] On this point, *see* Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, Oct. CPI ANTITRUST CHRONICLE (Oct., 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998220.

[76] For good perspectives, see Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 UNIV. PA. L. REV. 925, 933-936 (1979), who observes that the two positions have "since overlapped, or crossed over…." Id. at 925. See also William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COL. BUS. L. REV. 1, 74 – 75 (2007).

[77] RICHARD POSNER, ANTITRUST: AN ECONOMIC PERSPECTIVE (1976); RICHARD A. POSNER, ANTITRUST (2d ed. 2001), purports to be a second edition, but is so thoroughly revised that it is really a different book.

[78] BORK, PARADOX, *supra* note 9.

Antitrust Law treatise (1978, 1980).[79] From this period through 1990 the Supreme Court deviated rightward from a path in which the government won nearly all of its antitrust cases and private plaintiffs won many, to one that was far more favorable to defendants. The most important decisions on the merits that reflect this shift are *General Dynamics* and *Marine Bancorporation* (1974)[80]; *Illinois Brick*, *Brunswick*, *GTE Sylvania*, and *Fortner II* (1977)[81]; *Truett Payne* (1981),[82] *Associated General Contractors*,[83] *Jefferson Parish* and *Copperweld* (1984),[84] *Cargill* and *Matsushita* (1986),[85] and *ARCO* (1990).[86]

Aside from antitrust, however, the Supreme Court moved much more

[79] 1, 2 & 3 PHILLIP E. AREEDA & DONALD TURNER, ANTITRUST LAW (1978); 4 & 5 id. (1980). For subsequent volumes, *see* PHILLIP E. AREEDA AND HERBERT HOVENKAMP ANTITRUST LAW (22 vols. 3d & 4th eds., 2010-2017).

[80] United States v. General Dynamics Corp., 415 U.S. 486 (1974) (refusing to condemn horizontal/product extension merger); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) (refusing to condemn conglomerate merger because of low entry barriers, citing Areeda). *See also* United States v. Connecticut Nat. Bank, 418 U.S. 656 (1974) (refusing to condemn merger)

[81] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (denying indirect purchasers a damages recovery, citing Posner and Areeda); Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) (denying antitrust standing to firm that was not victim of "antitrust injury" – see discussion *infra*, text at notes 201-202, citing Areeda); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (vertical nonprice restraints must be analyzed under rule of reason, citing Posner and Bork); U.S. Steel v. Fortner Enterp., Inc. (Fortner (II), 429 U.S. 610 (1977) (adding serious market power requirement to tying cases).

[82] J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (rejecting Robinson-Patman "automatic damages" rule).

[83] Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Coun. Of Carp. 459 U.S. 519 (1983) (denying standing to plaintiff who could not show relationship between its injury and harm to competition, citing Areeda & Turner).

[84] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (strengthening market power for tying, citing Areeda, Posner, and Bork); Copperweld Corp. v Independence Tube Corp., 467 U.S. 752 (1984) (corporate parent and wholly owned subsidiary lacked conspiratorial capacity, citing Areeda)

[85] Cargill, Inc. v. Monfort of Colorado, Inc, 479 U.S. 104 (1986) (denying standing to competitor alleging aggressive pricing as a consequence of merger; citing Areeda, Bork, & Posner); Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574 (1986) (greatly expanding criteria for summary judgment in case involving claims of agreement and predatory pricing; citing Areeda & Turner, Bork, Easterbrook).

[86] Atlantic Richfield Co. (ARCO) v. USA Petroleum Co., 495 U.S. 328 (1990) (plaintiff injured by competitor's maximum resale price maintenance did not suffer antitrust injury, citing Areeda & Turner, Bork, Easterbrook).

generally rightward under the direction of three consecutive Republican Chief Justices: Warren Burger, William Rehnquist, and later John Roberts.[87] While all three were conservative politically, none has ever expressed much affinity for either the Chicago School or the Harvard School as such. This fact raises a question about the extent to which changes in antitrust direction were really inspired by either of these antitrust schools; or did they simply reflect a general change in the direction of political ideology. Of course, the two theories are not mutually exclusive.

Since the 1970s the term "Chicago School" has often served as a kind of whipping boy for critics of any antitrust policy that is noninterventionist or that favors defendants.[88] On the other side, it has been credited by admirers for what they see as antitrust's greatest achievements.[89]

The Chicago School has had considerable influence on both antitrust decision making and scholarship. Nevertheless, at the level of specific rule making, the course pursued was most generally that proposed by the Harvard School. That remains true to this day. Speaking generally, antitrust has tended to take a moderate position between extremes, reflecting an insistence that theories of both competitive harm and offsetting explanations be well developed, and that fact findings be both sufficient and justified. Today, both movement antitrust on the left and the reactionary leftovers of the Chicago School on the right reach the strong conclusions that they do by giving short shrift to these concerns.

To an extent, Bork himself was cut from the same cloth as the proponents of movement antitrust today: many of his views were more extreme than the literature supported, and he denigrated individual empirical inquiry unnecessarily. For example, just as movement antitrust tends to assume competitive harm without good evidence, Bork tended to assume that efficiencies explained most restrictive practices. Further, he rejected any idea that they should be individually proved. Courts would get it wrong because they would overlook evidence of efficiencies rather than evidence of competitive harm.[90] The Harvard School's approach to the rule of reason has the advantage that it takes evidence of both harm and offsetting justifications more seriously. It has the disadvantage that the rule of reason has become

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[87] There were actually four consecutive Republican Chief Justices. Earl Warren was a Republican appointee (Republican Governor of California and Eisenhower appointee) as well, but also the most liberal Chief Justice in American history.

[88] E.g, HOW CHICAGO OVERSHOT THE MARK (Robert Pitofsky, ed., 2008).

[89] *See* Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013 (2017) (attributing many of the developments discussed here to the Chicago School, and partly to Justice Scalia's interpretation of the Sherman Act).

[90] E.g., s*ee* discussion *supra*, text at notes 32-33 (Bork and futility of trying to measure efficiencies); *and see infra*, text at notes 163-165 (Bork and oligopoly).

unduly cumbersome and costly to litigate.[91]

What follows is a brief summary of the most important developments in antitrust doctrine since the 1970s.

Predatory Pricing and Other Single-Firm Exclusionary Practices

In the law of exclusionary (predatory) pricing, the traditional Chicago School view was that the practice was irrational and was so rare that the best rule should be per se legality.[92] Then Professor Posner's position was not as extreme. He concluded that predatory pricing was not common, but that it "cannot be dismissed as an irrational practice."[93] The Harvard School position, which Areeda and Turner first articulated in 1975, was closest to Posner's, although their test for it was different.[94] They concluded that predatory pricing was a rational act only in the presence of a probability of recoupment,[95] and that the proper price standard for evaluating it was either short-run marginal cost or average variable cost.[96] The Supreme Court and lower courts have largely followed the Areeda-Turner position.[97] Testing in this area has proven to be extremely difficult. Among the more tested propositions in the economic literature – and an area where the Supreme Court failed – was the relationship between oligopoly and disciplinary pricing

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[91]*See* Hovenkamp, *Rule of Reason*, note 29.

[92]E.g., BORK, ANTITRUST PARADOX, *supra* note 9 at 144-148; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 UNIV. CHI. L. REV. 263 (1981); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & ECON. 137 (1958).

[93]POSNER, ANTITRUST (1976), supra note 77 at 186.

[94]For Posner's test in 1976, s*ee id*. at 188-189 (proof of predatory pricing requires either (1) a price below short run marginal cost; or (2) a price below long-run marginal cost with intent to exclude a competitor).

[95]Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975):

> … [P]redation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains. Indeed, the classically-feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition

[96] *Id*. at 716.

[97]Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007). On the lower courts, *see* 3A AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 56, ¶¶725-742.

that was the subject of the *Brooke Group* litigation.[98] Given a long history of lockstep oligopoly pricing in the cigarette industry in question, and that the defendant's prices fell below average variable cost during the competitive period,[99] the cost of a false positive would have been very low in comparison with the policy cost of a false negative. When combined with an "agreement" requirement that makes coordinated action very difficult to prosecute except in cases of explicit interseller communication,[100] antitrust policy has been left toothless against coordinated interaction, with only merger policy available to keep bad situations from becoming worse.[101]

Vertical Intrabrand and Interbrand Restraints; Foreclosure

The Chicago School position on vertical intrabrand restraints[102] was that they were virtually never anticompetitive and the best rule for addressing them was per se legality. Bork concluded that "[a]nalysis shows that every vertical restraint should be completely lawful."[103] Posner, who was typically more moderate, agreed.[104] The Harvard School position was that anticompetitive outcomes were infrequent but possible, and that vertical restraints should be addressed under the rule of reason. Speaking about both nonprice restraints and minimum and maximum resale price maintenance, the Supreme Court adopted the Harvard School position. The changes occurred over a period of 30 years.[105]

The story on interbrand restraints, which include exclusive dealing and tying, is much the same. Bork concluded that "there is every reason to

[98]Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[99]*Id*. at 217.

[100]*See* 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶1428-1436 (4th ed. 2016).

[101]*See* discussion *infra*, text at notes 156-185; *and see* Herbert Hovenkamp, *Prophylactic Merger Policy* (SSRN, Feb., 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090650 (on use of merger policy to reach coordinated interaction that antitrust is otherwise unable to reach).

[102]Vertical intrabrand restraints limit distribution of the supplier's own brand. These include resale price maintenance and nonprice restraints such as location clauses or territory assignments.

[103]BORK, ANTITRUST PARADOX, *supra* note 9 at 288

[104]Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 UNIV. CHI. L. REV. 6 (1981).

[105]*See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (vertical nonprice restraints must be analyzed under rule of reason); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (same; resale price maintenance). *See also* State Oil Co. v. Khan, 522 U.S. 3 (1997) (same, maximum resale price maintenance).

believe that exclusive dealing and requirements contracts have no purpose or effect other than the creation of efficiency."[106] He criticized Phillip Areeda for arguing that exclusive dealing might cause anticompetitive foreclosure in some situations. This was consistent with his own belief that foreclosure theories of antitrust liability – namely, that a firm could use an exclusive contract or other practice to keep rivals out of the market -- were bogus.[107] In a lengthy discussion he analyzed many forms of tying and the rationales offered for them – including leverage, evasion of regulation, price discrimination, metering, cost savings, and protection of good will. He concluded that "[i]n our present state of knowledge, this means the law would accept the legality of all tying arrangements…."[108]

Bork's *Antitrust Paradox* was an "old economy" book, however, taking very little notice of intellectual property rights, networks and other recent technologies that have produced a great deal of tying litigation.[109] Posner was a little more constrained than Bork on exclusive dealing, finding it an "unlikely" strategy, but not one that could be ruled out altogether.[110] On tying, he was also more qualified than Bork, finding possible grounds for condemning ties used for price discrimination.[111]

The Harvard position on tying has evolved and is more complex. First, the old Harvard structuralist position twenty years prior to the publication of the *Antitrust Law* treatise was Carl Kaysen and Donald Turner's argument in 1959 that tying should be illegal per se, although they believed that exclusive dealing should be subject to the rule of reason.[112] The *Antitrust Law* treatise did not get to tying and exclusive dealing until 1995-1996, after Turner was gone and around the time of Areeda's death.[113] In 1976, however, Areeda wrote an article arguing that most tying injuries were inherently offset. That is, a seller could obtain a higher price for one of the products only by a corresponding reduction in the price of the other product.

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[106]BORK, ANTITRUST PARADOX, *supra* note 9 at 309.

[107]*Id*. at 304, quoting and critiquing PHILLIP E. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 635 (2d ed. 1974). For Bork's rejection of foreclosure, *see* discussion *infra*, text at note 179.

[108]BORK, ANTITRUST PARADOX, *supra* note 9 at 380.

[109]*See* Hovenkamp, *Design of Production*, *supra* note 23.

[110]POSNER, ANTITRUST (1976), *supra* note 77 at 205.

[111]*Id*. at 171-179.

[112]CARL KAYSEN AND DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959) at 157-158 (per se rule for tying); 159-160 (rule of reason for exclusive dealing).

[113] The relevant volumes are 9, 10, & 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (4th ed. 2018) (forthcoming). The first editions were published in 1995 and 1996. Volumes 9 & 10 address tying; 11 addresses exclusive dealing. Turner died in 1994 and Areeda in 1995.

As a result, he argued, buyers upon whom tying was imposed should not have a damages action.[114] This argument is a qualified embrace of the Chicago School rejection of the leverage theory insofar as overcharges are concerned: since there is a single maximizing monopoly price, a price increase in one tied-up product requires a compensating reduction in the other one.[115] Areeda also found no competitive harm from price discrimination ties.[116] Both of these were "extraction" arguments, however, aimed at the view that tying enabled the leveraging of higher prices. They did not qualify the traditional Harvard School acceptance of foreclosure of rivals or new entrants as an antitrust concern. In 1986 Areeda published a lecture categorically arguing in favor of a rule of reason for tying.[117] That position remains reflected in the *Antitrust Law* treatise, which generally argues for presumptive legality, but condemnation if market power and anticompetitive harm are proven under clearly articulated theories.[118] The Treatise also continues to accept foreclosure as a relevant concern, and the case law generally does as well.[119]

The Supreme Court has addressed tying in three substantive decisions since 1980. In dicta in *Jefferson Parish* (1984) it suggested that precedent required adherence to a per se rule condemning it.[120] Nevertheless, the Court conducted a lengthy rule of reason-like treatment and then approved the tie for lack of sufficient market share.[121] In the hotly disputed *Kodak* decision it found sufficient tying product market power based on a "lock in" theory, a query that would have been unnecessary if ties were legal per se.[122] Further, the action was brought by competitors, who argued that they were foreclosed from the market for maintaining Kodak photocopiers. Justice Scalia's dissent objected to the power finding, and in the process observed that the Court was

[114]Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

[115] The argument was developed principally in Ward Bowman, *Tying and the Leverage Problem*, 67 YALE L.J. 19 (1957). However, Areeda did not cite Bowman.

[116]Areeda, *Antitrust Violations*, *supra* note 114 at 1137-1138 nn. 49-51.

[117]Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 587 (1986).

[118]*See* 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP ANTITRUST LAW ¶1729 (4th ed. 2018, in press) (briefly summarizing the theories).

[119] *Id*., ¶¶1708-1709.

[120]Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984) ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se").

[121]*See also* United States Steel Corp. v. Fortner Enter. (Fortner II), 429 U.S. 610 (1977) (signaling change to a more serious market power requirement).

[122]Eastman Kodak Co. v. Image Tech. Svces., 504 U.S. 451 (1992).

proceeding under a per se theory. Further, the majority expressly embraced a foreclosure theory, and Justice Scalia did not appear to reject it.[123] Finally, in *Illinois Tool Works* the Court held that tying power could not be inferred from a patent, but it did not overrule tying law's idiosyncratic per se rule that requires proof of tying product power.[124] In its 2001 *Microsoft* decision the D.C. Circuit assumed that tying arrangements generally would be governed by a per se rule if the market power requirement were met, but then it created an exception for software operating system platform ties.[125]

To summarize, the courts have not come close to reaching the Bork position that tying should be legal per se. They have begun chipping away at the per se rule, and its demise seems all but inevitable. But in that case tying arrangements will be placed under the rule of reason, with foreclosure surviving as a central concern. This is essentially the Harvard position.

While the Supreme Court has not addressed exclusive dealing in this time period, the lower courts have consistently adhered to the Harvard School formulation, which is that exclusive dealing contracts are competitively harmless most of the time but can sometimes cause competitive harm when they foreclose competitors unreasonably. They are thus addressed under the rule of reason's burden-shifting framework. Plaintiffs continue to win some important cases – all on foreclosure rationales -- even in the twenty-first century.[126]

One important development is the increasing use of §2 of the Sherman Act in exclusive dealing cases. Section 2 has a higher market power requirement but is less categorical about other requirements than §3 of the Clayton Act and can reach conduct for which the "agreement" requirement has not been met.[127] This has contributed to a law of "quasi" exclusive dealing, covering various discounting practices that do not meet the orthodox definition of an agreement not to deal with one's rivals but can still serve anticompetitive purposes.[128]

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[123]*Id*. at 478, 482 (majority); id. at 486-487, 490 (Scalia, j., dissenting).

[124]Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

[125]United States v. Microsoft Corp., 253 F.3d 34, 89-91 (D. C. Cir. 2001).

[126]*E.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); McWane, Inc. v. FTC, 783 F.3d 814 (2015). The *McWane* court made clear that the rule of reason applied to exclusive dealing agreements, with its usual burden-shifting approach. 783 F.3d at 833. *Accord* United States v. Microsoft Corp., 253 F.3d 34, 70-71 (D.C.Cir. 2001) (applying rule of reason burden shifting and condemning exclusive dealing).

[127]E.g., *Dentsply*, *supra (*applying §2 of the Sherman Act). *See* 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶768 (4th ed. 2015); 11 *id*., ¶1800.

[128]*E.g.*, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012)

Other practices raise similar concerns. For example, Google, who competes in online travel agency (OTA) markets, requires other OTAs to provide proprietary information about things such as room availability or special discounts.[129] This practice may operate as a form of quasi exclusive dealing to the extent that it hinders rival OTA's ability to compete. Offsetting this, of course, is the fact that, while Google's share of search is high, it is only one of many general search engines, and competing OTAs such as Orbitz and Expedia operate their own successful specialty search engines. So one important question is whether Google has the power to produce anticompetitive results when consumers have readily available alternatives and switching is virtually costless.[130]

The *American Express* case, which the Supreme Court has agreed to review, also involves an interbrand restraint.[131] The government used §1 of the Sherman Act to challenge Amex's merchant "anti-steering" rules. These forbid retailers who accept the American Express card, which is particularly expensive for merchants, from offering discounts to customers who use other cards.[132] The result serves to insulate card users from Amex's higher merchant fees by making them indifferent to alternatives that may be less costly. The Second Circuit threw out the traditional rule of reason approach that attempts to avoid "balancing" pro- and anti-competitive effects whenever possible. Rather it went to the opposite extreme, making balancing a part of the plaintiff's prima facie case.[133]

In general, a properly structured rule of reason is a safe spot for antitrust to be in when current theory is not as robust as it should be. It allows for litigation resources to be invested in the correct set of questions, which concern power and anticompetitive effects. The Supreme Court's ill conceived per se rule against ties developed at a time when very little was known about them, and the courts had a clearly exaggerated impression of

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(condemning above cost discounting program, analogizing it to exclusive dealing). Other decisions are discussed in 11 ANTITRUST LAW, *supra* note 113, ¶1807. The Supreme Court may address some of these issues in United States v. American Express Co., 838 F.3d 179 (2d Cir. 2016), *cert. granted*, 138 S.Ct. 355 (2017).

[129]*See* "Google-Hotel Travelolopoly," WALL STREET JOURNAL, Dec. 27, 2017.

[130]For one possibility, *see* Tim Wu, *Blind Spot: The Attention Economy and the Law*, ___ ANTITRUST L. J. ___ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941094

[131]United States v. American Express Co., 838 F.3d 179 (2d Cir. 2016), *cert. granted*, 138 S.Ct. 355 (2017).

[132] Id. at 191.

[133]*See* Hovenkamp, *The Rule of Reason*, *supra* note 29. *See also* Erik N. Hovenkamp, *Antitrust Policy for Two-Sided Markets* (SSRN working paper, Feb. 9, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3121481 (explaining the rule of reason for exclusionary practices in two-sided markets).

potential harms.[134] But the Bork conclusion that they should all be legal was equally premature.

Vertical Mergers and Foreclosure

Bork's view of vertical mergers was largely dictated by his position on vertical contractual restraints. First, he would never condemn a purely vertical merger on foreclosure grounds – essentially the same position he took for tying and exclusive dealing. Rather, "[p]roperly drawn and applied horizontal rules are all that we need."[135] He generally followed Coase's argument that a vertical merger "is merely an instance of replacing a market transaction with administrative direction because the latter is believed to be a more efficient method of coordination."[136] He briefly considered and rejected Areeda's suggestion that a vertical merger might create a second level monopoly, which would be more resistant to competitive entry and also less likely to innovate,[137] or that the merger might facilitate a price squeeze, injuring rival firms who are not vertically integrated.[138] Areeda did not exactly say that these practices should be unlawful, but only that "the law should not be indifferent to monopoly at the second level."[139]

Neither the Supreme Court nor any Circuit has addressed a vertical merger case since 1979. In that year the Second Circuit declined to condemn a merger based on a theory that both Bork and Areeda rejected – namely, that a post-merger firm might favor its own subsidiary over rivals in times of short supply.[140] Vertical merger law in the enforcement Agencies has hardly been robust, although they have obtained several consent decrees and some transactions were abandoned in the face of government scrutiny.[141] While

[134] 9 AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 118, ¶1720.

[135] BORK, ANTITRUST PARADOX, *supra* note 9 at 245.

[136] *Id*. at 227, citing Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386 (1937).

[137] BORK, ANTITRUST PARADOX, *supra* note 9 at 239, citing PHILLIP AREEDA, ANTITRUST ANALYSIS, *supra* note 107, 675-676.

[138] BORK, ANTITRUST PARADOX, *supra* note 9 at 243.

[139] AREEDA, ANTITRUST ANALYSIS, *supra* note 107 at 676.

[140] Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979) (rejecting argument that firm would discriminate in favor of its own subsidiaries in times of short supply). *See also* 4 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶1003 (1980), which also rejected this argument. On permissible rationales for condemning vertical mergers, *see* Hovenkamp, *Prophylactic Merger Policy, supra* note 101.

[141] For an exhaustive summary through 2016, see Steven C. Salop and Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994-2016* (June 30, 2017) available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2541&context=facpub. This document is an appendix to Steven C. Salop & Daniel P. Culley,

the Horizontal Merger Guidelines have been continuously revised through 2010, the vertical merger guidelines have not been touched since 1984. Even those Guidelines, however, were willing to condemn vertical mergers on theories that Bork rejected. One was a foreclosure theory Areeda proposed that the merger would raise entry barriers by requiring two-level entry.[142] The 1984 Guidelines also recognized a problem with mergers that involved the acquisition of a disruptive buyer in the downstream market that had been able to undermine collusion in the upstream market;[143] and also evasion of rate regulation.[144]

Bork categorically rejected foreclosure theories for condemning vertical mergers.[145] In the first edition of *Antitrust Law*, published in 1980, Areeda and Turner accepted it, although with severe qualifications.[146] Concerns analogous to foreclosure have re-entered the picture, however.[147] At least part of the reason is technology changes, or in some cases changes in the regulatory environment, that make foreclosure an increasing concern. These are particularly apt when the property being transferred between the upstream and downstream firm is a nonrivalrous good capable of being used an indefinite number of times.[148] In traditional markets for hard goods producers have a finite capacity which must be allocated, and they would understandably allocate them to their own subsidiaries rather than independent firms. For example, a truck wheel manufacturer which is acquired by a truck manufacturer has the capacity to make only a finite number of wheels.[149] If it transferred its full capacity of wheels to its own parent, then other truck manufacturers would be foreclosed from access to these. In the case of a market dominant wheel company and high entry barriers, that might leave rivals without good alternatives. Nevertheless, it is hard to find a good economic rationale for forcing a firm to share its output

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Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners, 4 J. ANTITRUST ENFORCEMENT 1 (2015). *See also* Hoffman, *Vertical Merger Enforcement*, *supra* note 66.

[142]1984 Guidelines, *supra* note 170, §4.21; cf. BORK, ANTITRUST PARADOX, *supra* note 9 at 240-242.

[143]*Id*. at §4.222.

[144]*Id*. at §4.23.

[145]BORK, ANTITRUST PARADOX, *supra* note 9 at 231-237.

[146]4 AREEDA & TURNER, ANTITRUST LAW, *supra* note 79, ¶1004 (accepting foreclosure theories, "although the conditions for such harm are stringent").

[147]*See* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, ___ YALE L.J. ___ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3052332.

[148]*See* Hovenkamp, *Prophylactic Merger Policy, supra*, note 101.

[149]*Fruehauf, supra*, 603 F.2d at 352-361. The court found the foreclosure percentages at issue – less than 6% -- were insufficient.

with rivals when its own subsidiaries require all of it. Intrafirm transfers of goods are a primary reason that firms integrate vertically, taking advantage of situations where the costs of such transfer are less than the costs of using the market.

But suppose that the asset in question is *Wonder Woman*, a digitized Hollywood film that is capable of being reproduced an unlimited number of times? *Wonder Woman* is owned by Time-Warner, whose recent proposed acquisition by AT&T, an internet service provider, has been challenged by the government. The concern is that vertically integrated AT&T, which also owns DirecTV, might now refuse to license *Wonder Woman* to rival programmers. Now the "capacity" argument no longer obtains: AT&T will never license so many performances of *Wonder Woman* through its own internet and cable subscribers that *Wonder Woman* is all used up. So if it denies rival cable or internet service companies access to *Wonder Woman* there must be another reason.[150] At least some of these can involve foreclosure.

A merger is usually challenged prior to its occurrence. As a result, there is no proof that competitive harm has occurred, but rather a fear that it might occur. Why would post-merger AT&T/Time-Warner deny *Wonder Woman* to subscribers of rival internet broadband or cable providers? *Wonder Woman* has already been made, can be licensed at very low cost, and is likely to claim high royalties, making short run profits very high. The vertical acquisition might make refusal to license *Wonder Woman* to outsiders physically possible, but that does not necessarily make it a profitable strategy.

The fear would come from one of several things. First, AT&T might deny *Wonder Woman* or other assets to rival carriers in order to induce customers to switch to DirecTV or an AT&T cable subsidiary. Alternatively, it might license *Wonder Woman* to competitors only at a higher price than it builds in for its own subscribers, and higher than the pre-merger price. Thirdly, under vertically integrated oligopoly firms might restrict their programs to their own subsidiaries, creating several vertically integrated silos and limiting the range of programs available to individual subscribers.

Ordinarily a firm can charge any price it pleases as far as the antitrust laws are concerned, and price discrimination of this kind is not unlawful. Nor does a firm ordinarily have a duty to share its products with rivals. But these are not the issues in a merger case, where the fear is that the merger will facilitate a higher price or lower output or product diversity than obtained prior to the merger. If that is likely, then the merger is unlawful under the

[150] Complaint, ¶¶5-6, United States v. AT&T, Inc., Case 1.17-cv-02511 (D.D.C., Filed Nov. 20, 2017); and see Hovenkamp, *Prophylactic Merger Policy*, *supra* note 101.

Clayton Act' incipiency standard, which condemns mergers that realistically threaten to lessen competition.[151] Nevertheless, at least one of these harms must be substantially likely to occur, generally as measured by objective tests designed to predict the post-merger firm's profit-maximizing course of conduct.

Ancillary Horizontal Restraints and the Rule of Reason

Richard Posner's brief mention of the rule of reason in his 1976 book was unilluminating and even disparaging, suggesting a belief that litigation under a rule of reason would be unwieldy.[152] History may prove him correct. Two years later, Bork's *Antitrust Paradox* included a highly influential taxonomy of "naked" and "ancillary" restraints that Bork took from Circuit Judge Taft's *Addyston Pipe* decision[153] as well as Bork's own previous writings.[154] He argued that a rule of reason requiring proof of power and anticompetitive effects was necessary if a restraint was determined to be reasonably ancillary to legitimate joint activity. He did not develop the modern conception of a prima facie case and subsequent shift in the burden of proof, which have become central features of modern rule of reason analysis. Three years later Phillip Areeda laid out some of the basic contours of the modern rule of reason in an essay for the Federal Judicial Center, discussing both the burden shifting framework that we now use, as well as the relevance of less restrictive alternatives.[155]

In a sense the rule of reason was a joint enterprise of the Chicago and Harvard schools. Bork's scholarship, building on Taft's work, developed the argument for the rule's domain by arguing for fewer applications of the per se rule. Subsequent Harvard School scholarship fashioned the rule of reason's modern, burden-shifting methodology of proof.

Market Structure, Barriers to Entry, and Horizontal Merger Policy

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[151]*See ibid*.

[152]POSNER, ANTITRUST LAW (1976), *supra* note 77, 213.

[153]United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); *and see* BORK, ANTITRUST PARADOX, *supra* note 9, at 26-30.

[154]Most importantly, Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).

[155]Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues, Federal Judicial Center*, FJC-ETS-81-1 (June, 1981). On the current state of the rule of reason for ancillary restraints, including the sequence of prima facie case, burden shifting to the defendant to show defenses, and the search for less restrictive alternatives, *see* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 15 (4th ed. 2017); Hovenkamp, *Rule of Reason*, *supra* note 29.

Beginning with the Cellar-Kefauver amendments to the merger statute in 1950,[156] modern merger policy was born during the high point of "structuralism" in antitrust law.[157] One attribute of structuralism was the structure-conduct-performance (SCP) paradigm, largely developed by Harvard economists in the 1930s through the 1950s, under which structure determined conduct and conduct determined the extent of noncompetitive performance. Under the logic of the SCP paradigm, if S entails C and C entails P, then C drops out as a variable of interest. We can infer noncompetitive performance directly from structure.[158] Following this logic, the Supreme Court's *Philadelphia Bank* merger decision held that when the structure of the market and the market shares of the merging firms attained a given minimum the merger should be illegal.[159]

Structuralism became the bullseye in Chicago School targeting of Harvard School industrial organization theory.[160] The attack on it was the topic of a legendary symposium at Airlie House, Virginia, in 1974, and produced an influential text on the subject.[161] In its most extreme form, this anti-structuralism virtually denied the existence of oligopoly or any other problematic form of market structure other than single firm monopoly or express collusion. That is, unless they colluded even the firms in a two or three firm market could be expected to behave competitively.

Bork took essentially that position. In *The Antitrust Paradox* he argued that, while mergers to monopoly should be unlawful because they eliminated all competition, mergers that left at least two competitors should

[156]Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (2012)).

[157]*See* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970, Ch. 11 (2015).

[158] *Ibid*. *See* Harvard economists EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 46-51 ([1933]8th ed. 1962); and Edward S. Mason, *Price and Production Policies of Large-Scale Enterprise*, 29 AM. ECON. REV. 61 (1939). *See also* JOE S. BAIN, INDUSTRIAL ORGANIZATION (1959). Bain received his Ph.D. at Harvard but spent most of his career at U.C. Berkeley.

[159] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

[160] For the subsequent history through the 1970s, see Herbert Hovenkamp, *The Neal Report and the Crisis in Antitrust*, 5 COMPETITION POLICY INT'L 217 (April 30, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348707. *See also* George C. Archibald, *Chamberlin Versus Chicago*, 29 REV. ECON. STUD. 2 (1961).

[161]INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1974). In sharp contrast, *see* MARK J. GREEN AND RALPH NADER, THE CLOSED ENTERPRISE SYSTEM: THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT (1971) (attacking antitrust enforcement for not pursuing industrial concentration).

be tolerated at least up to the point that the post-merger firm had 60% to 70% of the market.[162] This conclusion was driven in part by Bork's serious doubts that oligopoly behavior existed except in economics textbooks.[163] As a result, the principal fear of merger policy was price fixing, and that was independently unlawful. However, "as a tactical concession to current oligopoly phobia" Bork thought that mergers should be permitted if they would leave three "significant" companies in the market.[164]

Posner was more willing to accept oligopoly as a problem, but in light of their efficiency potential he also believed that the merger standards of the day were much too severe. He saw little need for antitrust intervention in cases where the four largest firms made up less than 60% of the market.[165] He also believed that inferences of harm could not be drawn from market shares alone, but depended on other factors showing the propensity of the market toward collusion.[166]

Areeda and Turner's original (1980) discussion of horizontal mergers largely accepted the then dominant literature on oligopoly pricing. They identified as "presumptively unlawful" any merger where the aggregate market share of the merging firms exceeded 10%, unless the acquired firm was very small. They then qualified these observations by stating that, when efficiencies are taken into account, a threshold in the range of 13% or 14% might be more sensible.[167] These standards were significantly more tolerant than the then existing case law reflected in such decisions as *Brown Shoe*[168] and *Von's Grocery*,[169] but significantly less tolerant than Bork's proposal, and somewhat closer to Posner's. Subsequent case law softened, but never came close to eliminating, the structural presumption. Rather, structure became a central factor among many that the courts must consider when evaluating a merger. The views of Posner, Areeda and Turner are more-or-less consistent with those adopted in the Horizontal Merger Guidelines in 1982 and subsequent revisions.[170]

In subsequent years merger standards were more fully articulated and periodically revised in successive editions of the Merger Guidelines. While

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[162] BORK, ANTITRUST PARADOX, *supra* note 9 at 221.

[163] *Ibid*.

[164] *Id*. at 221-222.

[165] POSNER, ANTITRUST (1976), *supra* note 77 at 112.

[166] *Id*. at 111-112.

[167] 4 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶915 (1980).

[168] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[169] United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[170] The current version is U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

the Supreme Court largely abandoned the field, lower court decisions have tended to follow the Guidelines. Those standards became more tolerant of mergers than Areeda and Turner originally proposed.[171] Neither the Guidelines nor the case law has ever come close to Bork's position that structure is unimportant until it reaches monopoly.[172] Further, today a growing consensus believes that merger law has become excessively tolerant, permitting too many mergers that harm consumer welfare by increasing prices.[173] This scholarship reflects a consensus that concentration does count, although not in the absolute way that the proponents of the SCP paradigm once imagined. Today market structure forms the principal content of a prima facie case against a horizontal merger, which can then be rebutted by various types of nonstructural evidence.[174] The dominant question is whether the merger is likely to raise price or reduce output in some relevant market. Both the changing standards and the subsequent evaluation indicates the extent to which antitrust merger analysis closely tracks prevailing theory and economic fact finding. This evidence continues to find strong and worrisome correlations between market structure and price-cost margins.[175]

The Harvard School, and with somewhat more quibbling the Chicago School except for Bork, both acknowledged that analysis of entry barriers had a role to play in merger enforcement. They agreed that if entry was easy and effective mergers were competitively harmless, but they disagreed about how entry barriers should be defined and measured. The Harvard School

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[171]Subsequent editions of *Antitrust Law* reflected the changes. The current version is 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶932 (4th ed. 2016).

[172]The decision that has come closest is United States v. Baker Hughes, Inc., 908 F.2d 981, 982-983 (D.C. Cir. 1990), which disparaged the use of statistical evidence of market concentration. For a critique, *see* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, ___ YALE L.J. ___ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046224. One important qualifier is that overall market structure is unimportant in unilateral effects cases, which consider elimination of competition between closely competing companies in a product differentiated market. On unilateral effects, *see* 4 AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 171, ¶914.

[173]*See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); and Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GMU L. REV. 703 (2017) (summarizing argument and studies).

[174]On the current framework, *see* Hovenkamp & Shapiro, *supra* note 172 On the types of nonstructural evidence that is relevant, *see* 4 AREEDA & HOVENKAMP, *supra* note 171, ¶¶940-955.

[175]Hovenkamp & Shapiro, *supra* note 172.

approach was reflected historically in the writings of Joe S. Bain, who defined entry barriers as some factor that limited market entry even as firms in the market earned returns above the competitive level.[176] By contrast, the Chicago School generally followed the approach proposed by Chicago economist George J. Stigler that an entry barrier is some cost that "must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."[177] The differences can be substantial. For example, substantial economies of scale can be an entry barrier under the Harvard approach but not the Chicago approach.[178]

Bork's view was more extreme than either approach. He doubted that barriers to entry existed at all, unless we define the setting of a competitive price or a government imposed entry restriction as an entry barrier. For Bork, nearly all of the things that had been characterized as entry barriers were in fact nothing more than efficiencies that incumbent firms had obtained but that prospective entrants had not been able to match.[179] Posner provided less elaboration, but his views seem closest to Stigler's.[180] One important consequence of Bork's denial of barriers to entry is that he rejected any theory of antitrust harm based on foreclosure, or the idea that a firm could exclude others from the market by means of an anticompetitive practice. For Bork, the only thing that could exclude rivals was the charging of a competitive price.

Today it is clear that the Harvard School has won this battle in both the case law and enforcement policy. Although the Federal Trade Commission has on rare occasion flirted with the Stigler definition of entry barriers,[181] the Harvard definition predominates in the case law.[182] The Merger Guidelines effectively adopt the Harvard definition by querying whether entry will be likely to occur in response to prices at above the competitive level.[183] As under the Bainian definition, the Guidelines also query whether entry can be expected to be timely, and will be sufficient to

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[176] JOE S. BAIN, BARRIERS TO NEW COMPETITION 72, 84 (1956).

[177] GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY 67 (1968).

[178] See, e.g., BORK, ANTITRUST PARADOX, *supra* note 9 at 311 (treating scale economies as entry barriers punishes efficiencies and thereby undermines antitrust policy).

[179] *Id*. at 310-329.

[180] *See* POSNER, ANTITRUST LAW (1976), *supra* note 77 at 92-93.

[181] *See, e.g., in re* Eichlin Mfg. Co., 105 F.T.C. 410, 483-485, 487-488 (1985) (higher cost of capital for entrants than for incumbents was not an "entry barrier" because the latter had faced similar risks when they entered).

[182] *See* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶420 (4th ed. 2016).

[183] 2010 Merger Guidelines, *supra* note 41, §9.

hold prices to pre-merger levels. This analysis of entry in terms of timeliness, likelihood, and sufficiently is strictly in line with the Bainian approach, whose fundamental concern is whether entry barriers will prolong supracompetitive prices.[184]

The Harvard definition is also the one most consistent with the consumer welfare principle, for it is best able to identify situations in which high prices are likely to be durable. We really don't care whether incumbent firms have surmounted some risk that enables them to charge monopoly prices without concerns about entry. We just want to know whether that position exists. This is simply another way of saying that entry barriers themselves are not unlawful, but neither do they suffice to make anticompetitive conduct lawful. The Stigler/Bork view reflected in Chicago School theory is much too moralistic. It assumes that a firm that has overcome certain entry risks is somehow "entitled" to require future entrants to surmount the same risks, even as it is engaging in anticompetitive behavior, or that it has a free pass to merge, even if the merger promises higher prices. In contrast, the Harvard approach asks the much more empirical policy question whether high prices are likely to persist, without making value judgments about the sequence of events that led to the current situation.[185]

Antitrust Federalism: the "State Action" Doctrine

Antitrust federalism is one area in which the economic values embodied in the antitrust laws and the consumer welfare principle give way to another concern: the Constitution recognizes states as well as the federal government as "sovereign," although limited to their own sphere and under the umbrella of the Supremacy Clause. This presents a hard question for true believers in antitrust: how should they react when a state does something that is clearly anticompetitive and harms consumers, such as authorizing a cartel of dentists to restrict the teeth whitening business to licensed practitioners.[186] Here, the Chicago School adhered closely to a welfare goal, while at least some conservatives or libertarians remain more sympathetic to concerns about federalism, even at the cost of economic efficiency. For example,

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[184]*Id*, §§ 9.1 (timeliness), §9.2 (likelihood), §9.3 (sufficiency). *See* United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984) (applying then existing Guidelines standards to conclude that entry was so easy that a challenged merger was unlikely to be anticompetitive, even though post-merger market share was close to 50%).

[185]*See also* Richard L. Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," (MIT Sloan School of Management, Working Paper #4457-04. Jan. 2004) (defending Bainian conception of entry barriers).

[186]North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015).

Justice Alito's dissent in the *North Carolina Dental* case is a strong protest that federal antitrust policy should keep its hands off, even if anticompetitive state policy fails to merit "a good-government seal of approval…."[187] The issue in that case was the "state action" doctrine, which can immunize a state-authorized cartel from antitrust law. The question of how broadly or narrowly it should be applied has repeatedly divided the Court.[188]

While Justice Alito's position may be that of a committed federalist, it is not reflected in the Chicago School literature. For example, Judge Posner applauded the Federal Trade Commission's repeated attempts to limit or perhaps eliminate the state action doctrine, which he saw as providing unwarranted protection for professional cartels.[189] In *The Antitrust Paradox* Bork barely acknowledged the "state action" doctrine.[190] In a single sentence he reiterated the position he had taken as Solicitor General in a government amicus brief in Cantor v. Detroit Edison.[191] That position was that an anticompetitive state rule was immune from federal antitrust scrutiny only if the state actually compelled the private party to act. If the party had discretion, then immunity would not apply. The Supreme Court has never categorically embraced that position.[192]

By contrast, Areeda and Turner argued for a two-prong test. First, there should be no state action immunity "without adequate public

[187]*Id*. at 1117.

[188]*See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶221-227 (4th ed. 2014) (discussing the cases).

[189]Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L.J. 761, 770 (2005). *See also* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 53-54 (1984) (critical of expansive antitrust "state action" doctrine for giving shelter to private cartels). On the FTC's repeated unsuccessful attempts to narrow "state action" immunity, *see* 1A AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 188, ¶231.

[190]*See* BORK, ANTITRUST PARADOX, *supra* note 9 at 350 (unnumbered note).

[191]Cantor v. Detroit Edison, 428 U.S. 579 (1976). *See* Brief for the United States as Amicus Curiae, Cantor v. The Detroit Edison Co., No. 75-122 (Dec. 8, 1975), 1975 WL 173812 (Robert H. Bork, Solicitor General; Thomas E. Kauper, head of the antitrust division).

[192]In *Cantor* itself, a deeply divided Court with no majority spoke somewhat favorably about a compulsion requirement, finding that it was not met in a regulatory regime in which a utility itself proposed a tariff requirement which, once adopted, became compulsory for that firm. *Cantor*, 428 U.S. 592-593. Two years later another divided Court rejected the requirement in Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978). Subsequent decisions have consistently made clear that compulsion is not required. *See* 1A AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 188, ¶224c.

supervision" of private conduct.[193] Second, state action immunity required "authorized state action clearly intended to displace antitrust law."[194] They also rejected the compulsion requirement. In its *Midcal* decision two years later, the Supreme Court adopted the Areeda-Turner position virtually verbatim.[195] This two-pronged *Midcal* approach has dominated the "state action" case law ever since.

The *Midcal* position is a significant concession to federalism, although it falls short of *carte blanche*. Under it a state may regulate as anticompetitively as it chooses, provided that it clearly articulates what it is doing and actively supervises any private conduct. What it cannot do, however, is simply surrender the power to exclude or collude to unsupervised private actors.

Private Enforcement

Collusion in an upstream market, such as for a raw material, often leads to price increases that are passed down the distribution chain all the way to consumers. One Chicago School contribution to private enforcement doctrine was the *Illinois Brick* decision, which limits damages actions to direct purchasers. The Chicago School analysis was based on an assumption that the overcharge was the correct measure of damages to each successive purchaser as a cartelized good passes down the distribution chain. While the formulas for computing such pass on are conventional, applying them in litigation would be heroic.[196] Further, the argument went, a direct purchaser limitation might actually promote enforcement by giving one entity the full damages pool, rather than splitting the claim down the line. This would result in more efficient levels of deterrence.

By contrast, Areeda & Turner found the *Illinois Brick* rule to be "inconsistent with the statutory scheme," in that it awarded the damages to the wrong party. This was true because intermediaries typically pass on more of the overcharge than they absorb, leaving the brunt with end users.[197]

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[193] 1 AREEDA & TURNER, ANTITRUST LAW, *supra* note 53, ¶213 (1978).

[194] *Id.*, ¶214 (1978).

[195] California Retail Liquor Dealers Assn. v. Midcal Alum., Inc., 445 U.S. 97 (1980). *See id.* at 105 ("These decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself).

[196] *See* William Landes and Posner A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 UNIV. CHI. L. REV. 602, 618-620 (1979) (noting "severe difficulties of proof").

[197] 2 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶337e (1978).

Further, they argued, the true measure of the intermediary's damage was lost profits, not the overcharge. So lost profits should be awarded to intermediaries and overcharge damages to end users, whether or not they were direct purchasers.[198] In that case, there would be neither apportioning nor duplicative recovery.

The Supreme Court's announcement of the indirect purchaser rule produced fierce resistance among the states, and roughly half of them have developed *Illinois Brick* "repealers," by either legislation or judicial decision. The result has been a nightmarish system in which federal law gives direct purchasers the entire overcharge, while the law of many states provides for apportionment of passed on damages down the distribution chain.[199]

More problematically, the *Illinois Brick* rule was based on a misconception that damages experts must measure passed on damages by computing elasticities of demand and supply as goods are passed down the distribution stream. In many if not most cases, however, it is quite possible to assess passed on damages without these computations. For example, the very commonly used "yardstick" and "before and after" methodologies for computing damages use a different set of observations.

To illustrate, suppose we observe that widgets are selling at wholesale for \$10 in the cartel market, but \$6 in a similar "yardstick" market thought to be competitive. Further we observe that wholesalers in the cartel market are assessing a \$3 markup, while those in the yardstick market are assessing a \$4 markup. That is consistent with the general view that intermediaries pass on a portion of the markup, while also absorbing a portion. End users end up paying \$13 in the cartel market and \$10 in the yardstick market. In that case the overcharge damages of end users in the cartel market is \$3 per unit. The wholesalers are also injured. Their injury is not based on the overcharge at all, however, but on lost profits. They are injured by \$1 per unit sold, because their markup on each unit is \$1 less than the yardstick markup. They are also injured by the cartel output reduction which reduces their volume. The "before and after" method takes the same approach except that it examines the same market prior to the formation of the cartel or subsequent to its dissolution, or both.[200] To be sure, the real world provides difficulties that complicate the measure of damages, but the impact on indirect purchasers is

[198] *Id.*; *see also* Herbert Hovenkamp, *The Indirect Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990). This is also the current position of the *Antitrust Law* treatise. *See* 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶346k (4th ed. 2015).

[199] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §16.6d (5th ed. 2015).

[200] *See* Andrew I. Gavil, *Thinking Outside the Illinois Brick Box: A Proposal for Reform*, 76 ANTITRUST L.J. 167 (2009).

no more unmanageable than most of these. In light of the state-federal mess that *Illinois Brick* has produced, it is time for that rule to be reconsidered.

The most important antitrust development in private enforcement in the late 1970s was the "antitrust injury" doctrine, which aligned private entitlement to sue more closely with the goals of the antitrust laws. It was substantially the creation of Phillip Areeda, who used the then pending *Brunswick* case as an example of an antitrust violation for which damages should not be recovered.[201] *Brunswick* involved a vertical merger. Defendant Brunswick was a major producer of bowling equipment, which set up turnkey bowling alleys, providing them with the equipment they needed to create a functioning business. It also had a program of acquiring foundering alleys who were unable to pay their bills. The City of Pueblo, Colorado, had two major bowling alleys. One was the plaintiff and the other was a struggling alley heavily indebted to Brunswick. Brunswick then bought the failing alley and placed it on a firm financial footing. The plaintiff argued that this acquisition was an unlawful merger. Further, absent the merger the rival alley would have gone out of business, leaving the plaintiff as the dominant firm. Given the acquisition, however, the plaintiff was forced to compete with the newly rehabilitated alley.

The plaintiff's theory of action essentially turned antitrust policy on its head. It was clearly injured in fact by the merger, but it wanted to use antitrust law to protect itself from competition. The merger "harm" of which it was complaining was the rehabilitation of a rival that preserved competition in the plaintiff's community. Writing for the Court, liberal Justice Thurgood Marshall developed the "antitrust injury" doctrine requiring that private antitrust claims be reasonably related to the reason we have antitrust laws. Even assuming that the vertical merger in question was unlawful, the plaintiff was injured by increased rather than lessened competition.

The "antitrust injury" doctrine is one of the most frequently used doctrines today to limit recoveries by antitrust plaintiffs who are seeking to use the antitrust laws for anticompetitive purposes, or else for purposes that have nothing to do with competition. More than 1600 federal antitrust cases have cited it,[202] and it governs both damages actions and equity suits.[203]

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[201] Phillip E. Areeda, *Antitrust Violations Without Damages Recoveries*, 89 HARV. L. REV. 1127 (1976), discussing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[202] According to a Westlaw search (Jan. 5, 2018), 1676 federal court decisions have cited *Brunswick* and mentioned antitrust injury. On the "antitrust injury" doctrine as a limitation on antitrust standing, *see* 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶337 (4^{th} ed. 2015).

[203] *See* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) (extending antitrust injury doctrine to lawsuits seeking an injunction).

Importantly, it is generally not a doctrine that relies on proven facts, but rather on the plaintiff's theory of harm. As a result, cases can be addressed on antitrust injury grounds on motions to dismiss by simply assessing the plaintiff's theory of injury.

IV. Improving Antitrust Without an Antitrust Movement

The Need for Coherent and more Administrable Goals

Is antitrust living up to expectations? Before we can answer that question, we must identify what reasonable expectations are. If the premises of movement antitrust obtain, then antitrust must become involved in questions about wealth distribution and wages, small business welfare, or limiting of political as opposed to purely economic power. By contrast, if antitrust's agenda is limited to practices that threaten low prices, increased output and product or service quality, then antitrust has a narrower path.

In fact, by either measure antitrust has fallen short. Nevertheless, the news is not all bad. First, antitrust today has a more widely accepted and defensible goal than it any time in its history – namely, consumer welfare. The goal of the antitrust laws should be to enable markets to produce the highest output of the highest quality goods and services consistent with competition. Along with this will come lower prices.

That goal provides a metric, which is manageable in theory. In fact, the only other coherent and measurable antitrust goal that has been articulated is general welfare, which is what neoclassical economists generally mean when they speak of welfare, or allocative efficiency. General welfare is the total welfare experienced by everyone affected by a situation, including producers as well as consumers. A crippling problem of general welfare tests, however, is that we lack the econometric tools to apply them in litigation in any but the clearest cases.[204]

Depending on assumptions, the theoretical difference between consumer welfare tests and tests that take producer welfare into account can be large. In litigation, however, the choice between the tests rarely matters.[205] Assuming we reject Bork's position that efficiencies should simply be

[204]*See* Herbert Hovenkamp, *Progressive Antitrust*, ___ ILL. L. REV. ___ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892336

[205]*See* the Williamson "tradeoff" model and accompany figure: Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21 (1968); reprinted in BORK, PARADOX, *supra* note 9 at 107. On the immateriality of the test to actual litigation outcomes, s*ee* Hovenkamp, *Progressive Antitrust*, *supra* note 204.

presumed without proof,[206] the difference between consumer welfare and general welfare has bite in one situation: namely, where a practice is actually proven to reduce output and increases price, thus injuring consumers, but the gains that accrue to producers or others are determined to be larger than the losses experienced by consumers. Those cases require measurement of a welfare tradeoff. This means, first, that consumer losses must be quantified. We need to know the extent to which a practice raises price and reduces output, and thus the cost of inefficient consumer substitutions. This requires information not only about the size of an output reduction and price increase (or quality loss), but also about the shape of the demand curve in the affected range. Having measured this, we would also have to measure the gains experienced by producers and others. In the simplest case involving an efficiency created cost reduction but no product change, we would need to know the amount of the reduction and the per unit cost savings. If the savings were in increased quality, we would have to be able to quantify that, and quality-adjusted output is tricky to measure. Once measured, these consumer losses and producer gains would have to be netted against each other. Importantly, any claimed efficiencies in such cases would be accruing at lower output levels than obtained prior to the practice. Economies of scale, the most common efficiency, generally accrues at higher outputs, not lower ones.[207] If output is as high or higher under the challenged practice consumers are not injured at all and there will not be a welfare tradeoff.[208]

By contrast, assessing a particular antitrust problem under a consumer welfare test requires no more than an ordinal estimate of market output, whether up or down.[209] We do not need to know how much market output or quality changes, but only that it does and in which direction.[210] There are no tradeoffs to be made. Focusing on output is frequently better than focusing on price, particularly in cases involving monopsony. When monopsony power is being exercised the relevant purchasing prices go down, but output goes down as well.[211]

The market power requirement can also provide a simplifying screen. In

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[206]*See* discussion *supra*, text at notes 32-33.

[207]S*ee* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 734 (2017).

[208]*Ibid*.

[209] One must distinguish market output from firm output. For example, in an exclusion case the *defendant's* output may go up to the extent that it is anticompetitively capturing sales from others; however, overall market output will go down.

[210] Or in an attempt case, that there is a dangerous probability that if the conduct runs its course market output will go down.

[211] *See* discussion *infra*, text at notes 246-267.

all cases where output effects are not intuitively obvious the market power requirement can serve to screen out harmless cases. For example, if a few insignificant firms that lack any market power form a venture that causes them to lose sales, the venture will be unprofitable but consumers will not be harmed. The venturers' output will decline, but not that of the market as a whole. Antitrust harm requires that an actor with market power can profitably reduce the output of the market as a whole. In such a case a market power inquiry can be a simpler way of getting to an answer than direct measurement under any welfare test, including consumer welfare.

In sharp contrast, the broader goals identified by movement antitrust, including control of political power and wealth equality, job provision and wages, and protection of small business, are much more difficult to assess. Worse yet, they often operate at cross purposes with one another. For example, to the extent that large firms are more efficient, their output will be higher and they will provide more jobs. Further, large firms historically pay higher wages and salaries than smaller firms, although the difference is shrinking.[212] For example, Amazon, a frequent target of movement antitrust, pays higher wages for the same jobs than its competitors.[213] As a result, breaking up large firms may reduce rather than increase employment, and may force wages lower. Most importantly is metrics: one cannot simply send federal judges out with a hodgepodge of conflicting goals and tell them to make some antitrust policy.

The consumer welfare principle speaks to some of these goals, at least indirectly.[214] For example, although wealth equality and job creation are not separately articulated goals of antitrust under the consumer welfare principle, competitive markets are very likely conducive to more appealing distributions of wealth than monopolized ones.[215] To be sure, even a highly

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[212] *See, e.g.*, Thierry Lallernand, et. Al., *Why D Large Firms Pay Higher Wages? Evidence from Matched Worker-Firm Data*, 26 INT'L. J. MANPOWER 705 (2005); Charles Brown and James Medoff, *The Employer Size-Wage Effect*, 97 J. POL. ECON. 1027 (1989).

[213] As a result, Amazon is less impacted by increases in minimum wages. *See* Jeremy Bowman, *As Minimum Wages Go Up, Amazon.com Looks Like the Bigger Winner*, MOTLEY FOOL, Apr. 8, 2016, available at https://www.fool.com/investing/general/2016/04/08/as-minimum-wages-go-up-amazoncom-looks-like-the-bi.aspx.

[214]Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015) (discussing, inter alia, relationship between market power and inequality and offering several proposals for using the antitrust laws to address inequality issues).

[215]*See, e.g.*, Sean Ennis, Pedro Gonzaga and Chris Pike, *Inequality: A Hidden Cost of Market Power* (OECD Working Paper, 2017), http://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-

competitive economy may experience uneven distribution of wealth, particularly when we take innovation into account. Further, to the extent antitrust under the consumer welfare principle seeks to maximize output it should also maximize employment, depending on the extent of productive efficiencies. Finally, as noted below, antitrust properly has a place in controlling restraints on competition in labor markets, and facilitating competitive labor markets may go a long way toward combatting wage suppression.[216]

An antitrust goal of pursuing wealth distribution independently of output maximization would suffer the same fate as so many populist antitrust goals. There is no metric that can be applied to it. Should plaintiffs who are poorer than defendants always win? If not, how do we choose? How would one go about identifying a practice that produces higher output and lower prices but yet should be condemned because it produces a less appealing distribution of wealth? The same thing is true of employment goals. In general, pursuing higher output can be trusted to yield higher employment. But another way to keep employment up is to reduce productive efficiency. So should there be some set of practices that yield higher product output and lower prices, but that should be condemned because they also produce production efficiencies that reduce the number of jobs? If that is our starting principle, how far should it be pursued?

The Market Power Problem

Recent literature suggests that market power, measured by price-cost margins, is rising.[217] The increase began to occur in the early 1980s, at about the same time as the Reagan-era antitrust revolution.[218] It is also worth noting that two of the principal targets of movement antitrust today – Google and Amazon – are not significant contributors to this phenomenon. Google's most common price to consumers is zero, and Amazon's margins are among the lowest in all retailing. To be sure, either company might be doing anticompetitive things. Their contracts with advertisers or suppliers might be unreasonably exclusionary, or they might use most-favored-nation or other loyalty-inducing long-term contracts in anticompetitive ways. But one need not abandon well developed antitrust tools for finding power and anticompetitive effects in order to evaluate these practices.

2017.pdf.

[216]*See* discussion *infra*, text at notes 246-267.

[217]Jan de Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, NBER Working Paper No. 23687 (Aug. 2017), available at http://www.nber.org/papers/w23687.

[218]*See id*. at 16 (profit rate relative to GDP grew fourfold during the period 1980-2014).

Changes in antitrust policy may be a factor in this rise of price-cost margins -- or not. Other things may also be at work here. First, during this same period the economy became far more digitized and information-based. The result is significant changes in cost structure, with a much higher percentage of American investment being in fixed cost assets. This would serve to increase price-cost margins. The authors purport to account for this change. In any event, to the extent the rise in margins results from an increase in fixed costs, it is not an antitrust problem.

Second, as a result of decades of anti-union politics and legislation, wages have been suppressed in favor of company profits. That is to say, even as profits have risen dramatically, real wages have remained constant at best and labor participation represents a steeply declining section of industry returns, even if adjusted by changes in technology that reduce the demand for labor.[219] Most aspects of this are not an antitrust problem either, although we show later that there are strong arguments for paying more attention to labor market concentration, particularly in merger cases.[220]

Third, to the extent that merger policy is underdeterrent, too many mergers have very likely resulted in non-cost-justified price increases. As noted below, merger policy needs to become more aggressive to keep higher product prices in check.

Finally, there is a clear link between market competitiveness and the distribution of wealth. While antitrust has no place in addressing distribution of wealth aside from concerns for competition, the fact is that markets with high output and lower price cost margins can also yield greater amounts of wealth equality. [221] Here, the consumer welfare principle has a decided advantage over more general measures of welfare.[222] Much of the increased value that results from a general welfare standard is wealth that accrues to producers. The same thing is true of Bork's approach. By contrast, the consumer welfare standard is least tolerant of market power because it does not include producer profits in its welfare calculus.

Market Concentration and Merger Policy

On market structure, antitrust can take one of three quite different paths. The first, which is Bork's approach of ignoring concentration and pursuing only monopoly or explicit price-fixing, seems to be completely discredited in the literature.[223] At the opposite extreme, and consistent with movement antitrust, is the view that antirust should pursue high concentration

[219]One site that collects these data is Pew Research Center.org.
[220]*See* discussion *infra*, text at notes 246-267.
[221]*See* Baker and Salop, *supra* note 214.
[222]*Id*. at 16-17.
[223]*See* Hovenkamp & Shapiro, *supra* note 172.

for its own sake. It could do so by creating a metric arbitrarily – for example, simply saying that no merger will be approved if it results in fewer than ten firms (or some other number) in a market, regardless of costs, economies of scale, or other factors that determine output and price.

The middle alternative is that market structure is relevant but only as a way of getting at concerns about output and price. That is, high concentration becomes an antitrust problem when it leads to lower output and higher prices. This of course imposes on antitrust enforcers a need to assess the relationship between concentration and output. For example, the structural thresholds in the 2010 Horizontal Merger Guidelines are not placed there for their own sake, but only because they support an inference that as market structures become more concentrated the dangers of collusion or collusion-like behavior become more severe.[224] Further, at different times people have held very different views about the relationship between high concentration and high profits or, more accurately, high margins. Robert Bork and some members of the old Chicago School substantially denied that there was any relationship at all.[225] By contrast, for followers of the SCP paradigm in the 1950s and 1960s, industrial concentration was the *raison d'être* for antitrust policy.[226] The current literature tends to find a troublesome relationship between high concentration and high price-cost margins.[227]

"Industrial concentration," as the literature generally calls it,[228] is often misunderstood by those who see high concentration as a primary antitrust target. *First*, high concentration operates as a means and not as an end in itself. *Second*, the term refers to the number of firms in a properly defined market and, as such, has little to do with absolute size.[229] For example, if delivered ("redi-mix") cement is a relevant market, a small community with two such firms would exhibit a high level of market concentration, even though the firms each have a dozen employees, two or three trucks, and few other assets. Pre-mixed concrete can be delivered only over a small geographic range, meaning that the number of competing firms

[224] *See id.*

[225] *See* discussion *supra*, text at notes 163-164.

[226] *See* discussion supra, *text* at notes 157-162.

[227] *See* Hovenkamp & Shapiro, *supra* note 172; Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015); Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* 235, 253-254, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK (Robert Pitofsky ed., 2008).

[228] *E.g.*, INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 161.

[229] Although size *distribution* can be relevant, but only as a mechanism for predicting output and price. *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 199, §12.4a2.

can be small as well. By contrast, Kroger is an enormous player in the national retail grocery market, with some 2800 stores, but that market overall is fairly unconcentrated and even Kroger has less than 10% of it.[230]

Even during the high point of antitrust concern articulated as combatting industrial concentration, all sides understood that industrial concentration was not being attacked for its own sake, but rather because of a widespread belief that higher concentration led to lower output, higher prices, less competitiveness, or poorer performance measured in some other way. The first generation of concentration studies in the 1950s and 1960s attached the problem to correlations between concentration and accounting profits.[231] Today the concern about industrial concentration remains robust, but its focus has shifted to high price-cost margins. As firms face fewer competitors price-cost margins tend to rise.[232]

So what should antitrust do about it? The correct rules are empirically determined, moving targets, which change not only with further economic theory and empirical study, but also with changes in both production and transportation technology, as well as demographics. The area that exhibits this most strongly is mergers, with enforcement policy going from severely overdeterrent in the 1960s to underdeterrent today. These changes also explain why we have had several sets of horizontal merger guidelines since the first ones were issued in 1968,[233] and why we will very likely continue to have new sets every several years. Intelligent policy in these areas changes with further study about the structure and operation of markets, as well as with new technologies that often serve to make markets more or less competitive.

The relationship between concentration and output is a central question for antitrust policy. The history of antitrust reveals a great deal of anti-concentration rhetoric, but little in the way of accomplishment.[234] In that

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[230]*See* "Market Share of U.S. Food and Beverage Purchases in 2016," available at https://www.statista.com/statistics/240481/food-market-share-of-the-leading-food-retailers-of-north-america/.

[231] The debate is thoroughly recounted in INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 161.

[232]*See*, e.g., Michael Salinger, *The Concentration-Margins Relationship Reconsidered* (Brookings Papers on Economic Activity, 1990), https://www.brookings.edu/bpea-articles/theconcentration-margins-relationship-reconsidered/; Hovenkamp & Shapiro, *supra* note 172.

[233] Guidelines were issued in 1968, 1982, revised in 1984; 1992, revised in 1997; and 2010. The full text of all of them can be found on the FTC's website at https://www.ftc.gov/enforcement/merger-review; or the Antitrust Division website at https://www.justice.gov/atr/merger-enforcement.

[234]Kovacic, *supra* note 1.

regard, the safest interpretation of a recently proposed Senate bill, the "Consolidation Prevention and Competition Promotion Act of 2017,"[235] is that it targets increases in concentration that also tend to reduce output. The Bill is unlikely to pass in the immediate future, and some portions of it might be regarded as movement antitrust. Nevertheless, the bill states a concern for higher prices and low quality,[236] and a goal of clarifying "that the Clayton Act prohibits mergers that, as a result of consolidation, may materially lower quality, reduce choice, reduce innovation, exclude competitors, increase entry barriers, or increase price…."[237] Properly applied, the Clayton Act should already be doing these things. The bill would change the Clayton Act incipiency standard from condemning mergers that may "substantially" lessen competition to those that would "materially" lessen competition.[238] While the precise meaning is unclear, "materially" is presumably triggered at a lower level than "substantially" is. So far so good. If enacted, this bill could change the inferences to be drawn from given levels of market concentration, and also alter the burdens of proof, but not the underlying goals.

Section 3 (3) (1) of the proposed legislation would permit the Agencies, although not private parties, to challenge a merger if "the acquisition would lead to a significant increase in market concentration in any line of commerce or in any activity affecting commerce in any section of the country." Then the defendants can rebut by showing that the material injury to competition will be unlikely to occur. This is not an improvement in the current analysis of mergers. Under the Guidelines' current approach a prima facie case against a coordination facilitating merger depends on *two* things: first is the overall level of market post-merger concentration; second is the size of the increase in concentration caused by the merger.[239] The proposed provision effectively drops the first part of the inquiry without any explanation why that

[235] S.1812, 115th Cong., 1st Session (2017-2018), available at https://www.congress.gov/bill/115th-congress/senate-bill/1812/text.

[236] *Id*., §2 (a) (6) ("the anticompetitive effects of market power created by concentration include higher prices, lower quality, significantly less choice, reduced innovation, foreclosure of competitors, increased entry barriers, and monopsony power….").

[237] *Id*. §2 (b) (1)

[238] On "incipiency" in merger policy, *see* Hovenkamp, *Prophylactic Merger Policy*, *supra*, note 101.

[239] *See* 2010 Horizontal Merger Guidelines, *supra* note 41, §5.3, which regard concentration increases in the range of 100-200 HHI points as significant, depending on whether overall post-merger concentration is between 1500 and 2500 (moderately concentrated), or exceeds 2500 (highly concentrated). *See also* Hovenkamp & Shapiro, *supra* note 172 (defending this approach).

is important except perhaps that the bill is intended to pursue concentration for its own sake.

At least this first provision applies to horizontal mergers, because only they increase market concentration. However, §3 (3) (2) of the bill then permits the Agencies to pursue mergers between firms that have reached a given size threshold, measured by dollar amount, without regard to their competitive relationship. That is, it applies to mergers that are neither horizontal nor vertical.[240] If the size threshold is reached, the burden shifts to the defendants to show that the acquisition would not tend to materially lessen competition, with "materially" defined as "more than a de minimis amount."[241] Even at the high point of merger enforcement aggressiveness in the 1960s and 1970s the agencies had at least a theory about how nonhorizontal mergers might reduce competition and what were the evidentiary requirements.[242] Because nonhorizontal mergers do not increase concentration, this Section can only be understood as having absolute firm size as its target.

Perhaps the proposed legislation attempts to address – although awkwardly -- a serious and very real problem: too many recently approved mergers have led to higher prices.[243] That tells us that the currently employed standards for collusion-facilitating mergers are too tolerant. In that case,

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[240]*Id*., §3 (3) (2). The relevant dollar amounts are spelled out:

> "(B) (i) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $5,000,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2018, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2017); or
>
> "(ii) (I) the person acquiring or the person being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000 (as so adjusted and published); and
>
> "(II) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $50,000,000 (as so adjusted and published).

[241] Id., §3 (3) (1) (B) (i-iii).

[242]These theories are developed in 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 11 (4th ed. 2015), on potential competition and other "conglomerate" mergers.

[243]*See* discussion *supra*, text & note 173.

however, a better solution would be to revise the HHI numbers in the Guidelines back to the earlier Guideline levels, in which post-merger HHIs exceeding 1800 were counted as highly problematic, and then employ the burden shift at that stage. Then the Agencies need to stick to the numbers and convince the courts about the importance of doing so. One reason the Guidelines were revised was that the concentration numbers being applied were much higher than the concentration numbers that the Guidelines stated. That is, the Agencies were not following their own Guidelines.[244]

Antitrust and Labor Market Monopsony

Labor market issues show up in antitrust policy in several ways. First, a merger or other practice that results in an actual output reduction and price increase in the product market will very likely lead to a job reduction as well. *Ceteris paribus,* lower output requires less labor. Traditionally, when mergers are challenged in the merging firms' output (product) markets, the impact on labor is ignored. Second, a practice that results in lower prices and higher output should increase jobs. Once again, if the challenged restraint is in the product market litigants and courts generally ignore effects on employment. Third, a practice that results in *both* lower prices and greater productive efficiency could either increase or decrease jobs depending on the size of the resulting output increase and the nature and extent of the efficiency gains. For example, a merger that enables the post-merger firm to adopt labor saving devices or procedures could certainly reduce the demand for labor, but it is not antitrust's purpose to interfere with gains from productive efficiency, any more than it is patent law's purpose to deny patentability to labor-saving devices or processes.

Antitrust under the consumer welfare principle has a generally positive effect on employment, even though maximizing employment is not its focus. The correlation between low prices, high product output, and employment is not perfect, but it is a correlation nonetheless. That does raise a second question, however, which is whether antitrust should ever depart from the consumer welfare principle in order to improve employment outcomes? That is, are there situations in which antitrust policy should favor something other than low prices and high product output in order to increase either wages or the number of jobs? For example, should it oppose firms' adoption of labor saving technologies, or mergers that reduce costs, simply because the cost

[244] *See* Deborah L. Feinstein, *The Revised Merger Guidelines: Did the Agencies Heed the Lessons of the Past?* 1,3, THE ANTITRUST SOURCE (Oct. 2010), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Feinstein10_21f.authcheckdam.pdf.

reductions are thought to reduce the number of jobs? Once again, if the answer is yes, then the next question is metering. If a tradeoff is to be made between low consumer prices and increased employment, where do we draw the line?

Further, why use antitrust as the vehicle? If we really wanted to preserve jobs by limiting productive efficiency, changes in patent law would be a more direct route. For example, by denying patents to tractors, washing machines, automobiles and computers we might reduce the incentive to invent these things. Such a policy might preserve jobs by forcing people to stay with more labor intensive technologies. In the context of patent law such a proposal sounds perverse, but it is no less perverse in competition policy, even though the Supreme Court once pursued it.[245] Nevertheless, the analogies cannot be ignored: condemning a merger because it reduces costs by using less labor intensive technologies or forms of organization is no less perverse than denying a patent for the same reason. It would put government in the job of mandating more costly production in order to keep more labor intensive firms or technologies in the market.

This hardly denies antitrust policy a role in labor markets. It does suggest, however, that the same consumer welfare principles that apply in product markets should be applied to labor markets as well – with a little modification to account for the fact that workers *sell*, rather than purchase, their labor. Problematically, the markets in which labor is purchased are often less competitive than the product markets in which laborers work.[246] In fact,

[245]*See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (condemning vertical merger because it enabled the firm either to produce at a lower cost or else to produce better quality at the same cost). *See also* Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 515-18 (3d Cir. 1969) (condemning a merger between a manufacturer of rolling mills, used in the production of steel, and a manufacturer of the electric hook-ups for such mills, because the merger would create "the only company capable of designing, producing and installing a complete metal rolling mill," and this "would raise higher the already significant barriers to the entry of others."). During its heyday the Robinson-Patman Act was often employed to the same end. *See, e.g.*, Anderson Foreign Motors, Inc. v. New England Toyota Distrib., 492 F. Supp. 1383, 1386-1387 & n.4 (D. Mass. 1980) (on "backhaul" allowances); and Advisory Opinion No. 147, 72 F.T.C. 1050 (1967). Under the policy a seller could not compensate a firm for making a return trip from a delivery with freight moving in the return direction. The effect was to incentivize trucks to return empty in order to avoid injury to smaller rivals who were not in a position to take advantage of backhauls. On the Robinson-Patman Act's impairments of productive efficiency in order to protect rivals, *see* 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶2340b3 (4th ed. 2018) (forthcoming).

[246]*See* Jose Azar, Ioana Marinescu, and Marshall Steinbaum, *Labor Market Concentration* at 7-8 (NBER Working Paper No. 24147, Dec. 2017), available at

suppression of labor market competition is an area in which the antitrust laws are often underenforced. The problems can be addressed within the existing statutory framework of the antitrust laws, and by and large without requiring abandonment of the consumer welfare principle. The issue is relevant to several practices that are reachable under the antitrust laws, including unilateral acts of wage suppression,[247] noncompetition agreements, price-fixing and market division in wage and salary markets, and mergers threatening suppression of wages or salaries.

Business firms are purchasers rather than sellers of labor, so agreements that have anticompetitive effects on employment invoke the "monopsony" problem. Addressing monopsony power under antitrust law can be confusing because of a tendency to presume that low prices are invariably good ones.[248] The main practical problem is distinguishing between aggressive but competitive buying, which yields higher output; and monopsony, which ordinarily reduces output.

Under monopsony, a buyer with market power in its buying market reduces its purchases to infracompetitive levels, thereby reducing the supply. This is simply a monopoly output reduction turned upside down. Monopsony in labor markets can be hard to assess, because workers do not have easily measurable marginal cost functions.[249] Further, labor output may not be as responsive as manufacturing is to a monopsonistic price reduction. Conceptually, however, the problem is straightforward. In a perfectly competitive labor market an employer will pay precisely the marginal value of a worker. For example, if the worker contributes $10/hour to the firm's

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http://www.nber.org/papers/w24147.

[247] *See, e.g.*, Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 997 F.Supp.2d 142 (D.R.I. 2014) (sustaining §2 claim of monopsonistic suppression of health provider prices).

[248] *See* ROGER D. BLAIR AND JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (rev. ed. 2010). On labor markets, *see* V. Bhaskar, Alan Manning and Ted To, *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSP. 155 (2002). *See also* Vogel v. Am. Soc. Of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal *per se*. Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint."). *See also* Robert J. Thornton, *Retrospectives: How Joan Robinson and BL Hallward Named Monopsony*, 18 J. ECON. PERSP. 257 (2004).

[249] On some of the measurement difficulties, *see* Douglas O. Staiger, Joanne Spetz, and Ciaran S Phibbs, *Is There Monopsony in the Labor Market? Evidence From a Natural Experiment, 28* J. Labor Econ. 211 (2010); William M. Boal and Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LIT. 86 (1997).

value then the wage in a perfectly competitive equilibrium would be $10/hour. However, if the employer can profitably suppress the hiring market by paying $8/hour and hiring fewer workers or using them for fewer hours, then it would be producing less but would be earning more from each hour of labor. So an exercise of monopsony power involves suppression of an input, just as an exercise of monopoly power involves suppression of output.[250] If the range of hiring firms competing in a given area is small, the result can be suppression of wages. That is, just as high concentration leads to high price-cost margins in product sales, so too its leads to infracompetitive prices in employment markets. High labor concentration is not uncommon because employment markets are frequently smaller than product markets.[251]

Cartel agreements among employers suppressing wages are unlawful per se, and several decisions have condemned them.[252] These agreements can be either explicit price agreements, or in some cases market division

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[250] Just as the monopolist seeks to maximize profits by equating marginal cost and marginal revenue, the monopsonist tries to equate marginal outlay with marginal revenue. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §1.2b & n.25 (5th ed. 2015).

[251]*See* discussion *infra*, text at notes 259-261.

[252]*In re* VHS of Michigan, Inc., 601 Fed. Appx. 341 (6th Cir. Feb. 3, 2015) (approving employee class action in case alleging that eight hospitals conspired to suppress nurses' wages); Todd v. Exxon, 275 F.3d 191 (2d Cir. 2001) (Sotomayor, j.: employees' allegations of information exchanges sufficient to support claim of conspiracy to suppress wages of oil refining defendants); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) (condemning agreement among NCAA colleges to limit salaries of junior basketball coaches); *In re* High-Tech Employee Antitrust Litigation, 985 F.Supp.2d 1167 (N.D.Cal. 2013) (tech firms' "non-poaching" agreement not to solicit one another's employees; certifying employee class); Reed v. Advocate Health Care, 268 F.R.D. 573 (N.D.Il. 2009) (complaint of hospital conspiracy to suppress nurses' wages; denying class certification for failure to show impact by common proof); California v. eBay, Inc., 2014 WL 4273888 (N.D.Cal. Aug. 29, 2014) (approving settlement in case alleging agreement among tech firms not to hire each other's employees); Hall v. Thomas, 753 F.Supp.2d 1113 (N.D. Ala. 2010) (excluding expert testimony concerning causation in case alleging that defendant unlawfully suppressed wages of workers in poultry processing plant); Mueller v. Wellmark, Inc., 818 N.W.2d 244 (Ia. 2012) (rejecting most parts of claim that health insurer paid discriminatorily low reimbursement rates to chiropractors). *Cf.* Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002) (sustaining documented agricultural laborers' complaint that fruit growers imported undocumented workers with intent of suppressing wages of documented workers). *See* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015); Robert E. Bloch & Scott P. Perlman, *Reed v. Advocate Health Care: Anatomy of Class Certification Proceedings in a Wage Conspiracy Case*, ANTITRUST 63 (Summer 2010).

agreements.[253] Antitrust law permits multi-employer agreements on wages or other terms of employment only in the context of collective bargaining, under the so-called "non-statutory" labor exemption from the antitrust laws.[254] A naked agreement suppressing competition in hiring should be treated no differently than a price-fixing or market division agreement governing sale of a product. While these are often criminal violations, however, wage suppression agreements have historically warranted only civil actions.[255] That may reflect some lack of familiarity with such agreements – or it may reflect a supposition that naked wage fixing agreements are somehow less serious than product price fixing agreements. In any event, they should be treated symmetrically. Naked wage suppression agreements should be criminal offenses under the same set of conditions that product price fixing agreements are.

The labor monopsony issue also arises in merger cases, where it can be particularly difficult to assess. A post-merger firm's ability to bargain for lower outlays for wages or salaries could be regarded as either an "efficiency defense" to the merger, or else as an exercise of monopsony power. Suppose that two hospitals in a concentrated market should merge, offering as a defense their ability to negotiate reduced rates from certain providers. The question that invites is whether the post-merger firm is able to bargain down the price by purchasing in higher volume, thereby reducing transaction costs, or perhaps by counterbalancing market power in the selling market. In those cases the post-merger firm's ability to obtain lower input prices is efficient, and output of the purchased input can be expected to increase. By contrast, if the firm is taking advantage of labor market concentration to suppress output further by driving prices down, then the reduced price is not efficient at all but anticompetitive.

In United States v. Anthem, a divided panel of the D.C. Circuit

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[253] For example, anti-poaching agreements such as described in *In re* High-Tech Employee Antitrust Litigation, 985 F.Supp.2d 1167 (N.D.Cal. 2013), operate as market division agreements rather than explicit price-setting agreements. The employers are not fixing prices but rather making it more difficult for employees to move from one employer to another. In this case the agreements forbad participants from calling one another's software engineers to offer them an opportunity to switch jobs. The government had obtained a consent decree in the same case. United States v. Lucasfilm, Inc., 2011 WL 2636850 (D.D.C. June 3, 2011).

[254] *E.g.*, Brown v. Pro Football, 518 U.S. 231 (1996) (sustaining multi-employer union contract involving NFL team owners). *See* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶256 (4th ed. 2013).

[255] *E.g.*, U.S. Department of Justice Press Release, "Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), available at https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements.

condemned a merger of health insurers operating in two concentrated markets, rejecting as unsubstantiated a proffered efficiency defense that the post-merger firm would be able to negotiate lower provider rates. The court also observed that if the lower rates were an exercise of monopsony power they would not constitute a defense[256] -- a position taken by the 2010 Horizontal Merger Guidelines.[257] A dissenting judge found the efficiencies defense to be adequate but also acknowledged the government's alternative theory of the case, which was that the post-merger firm would have "monopsony power in the upstream market where Anthem-Cigna negotiates provider rates with hospitals and doctors."[258]

Business firm markets for hiring are often just as concentrated, if not more, than the product markets in which these firms operate.[259] One reason this is so is that the geographic markets in which firms hire are often much smaller than the markets in which they sell their products.[260] For example, a Silicon Valley tech firm might hire its engineers and other computer specialists in a relatively small geographic market, but sell its product nationwide or even worldwide. As the *Anthem* case indicates, the government has not ignored the problem, but it deserves more attention.[261]

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[256]United States v. Anthem, Inc., 855 F.3d 345, 356, 371 (D.C.Cir. 2017). *Cf.* West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010) (sustaining complaint that large hospital system and health insurer conspired to suppress reimbursement rates paid to providers); New Mexico Oncology and Mematology Consultants, Ltd. V. Presbyterian Health Care Serv., 54 F.Supp.3d 1189 (D.N.M. 2014) (sustaining cancer treatment facility's complaint of conspiracy between hospital and insurer to suppress reimbursement rates)

[257]*See* 2010 Horizontal Merger Guidelines, *supra* note 41 at §10 ("cognizable efficiencies … do not arise from anticompetitive reductions in output or service").

[258]*Anthem*, 855 F.3d at 377. The district court had not decided the monopsony issue, and the dissenter would have remanded for that determination. *Ibid*.

[259] *See* Azar, et al, *supra*, note 246. A related manifestation is that, because of wage suppression, wages make up a decreasing share of firm output and also of GDP. *See* David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, *Concentrating on the Fall of the Labor Share*, NBER Research Working Paper 23108 (2017), available at http://www.nber.org/papers/w23108; David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, NBER Research Working Paper 23396 (2017), available at http://www.nber.org/papers/w23396; Jordan Matsudaira, *Monopsony in the Low-Wage Labor Market? Evidence from Minimum Nurse Staffing Regulations*, 96 REV. ECON. STAT. 92 (2013).

[260]Azar, *et al*, *Id*.

[261]The 2010 Merger Guidelines, *supra* note 41, do include a §12 on mergers of powerful buyers. This section also notes the difference between anticompetitive

Is aggressive use of antitrust against anticompetitive wage or salary suppression consistent with the consumer welfare principle? Yes, provided that we are talking about true exercises of market power. The real problem of antitrust policy toward monopsony is not defending a policy so much as recognizing it in a particular case. If firms involved in anticompetitive suppression of wages have any significant power in the product or service market in which they sell, then wage suppression that reduces the amount of labor can be expected to translate into an output reduction in the product market as well. As a firm uses less labor it produces less, and if it has market power on the output side its price will rise. That would make it a clear case of consumer harm. While monopoly results in higher priced transactions and monopsony in lower ones, both tend to result in reduced output.

From a consumer welfare perspective, the harder case occurs when firms exercising market power for the purchase of labor lack power in the market in which they sell. In that case they may still produce less, but in a competitive market consumers in the product market will not be harmed. For example, a firm might hire locally and hold considerable monopsony power in the labor market, but sell its product nationwide or worldwide in a highly competitive market.[262] Here, the "consumer" label needs to be stretched a little, but not very much. Every employed person appears on the market as both a consumer and as a seller of his or her wages. For the purpose of analyzing wage suppression agreements, the worker stands in the same position on the sell side as the consumer does on the buy side. So in this case the same tools of economic analysis can be brought to bear.

In sum, the best understanding of consumer welfare is as promoting markets in which output of both product and labor is as high as competition permits. To be sure, not every exercise of market power results in a significant output reduction. For certain goods the elasticity of demand (or supply) is extremely low, and as a result output may not decline very much in response to a monopoly price increase. Typically, these are goods that

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exercise of monopsony power and efficient but competitive buying practices. They then give this example 24:

> Example 24: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

[262] These were the facts of Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 539 U.S. 312 (2007), which involved predatory buying. The defendant purchased raw hardwood locally but sold finished lumber in a national market in which it was a competitor.

consumers regard as necessities, or perhaps because the purchase requirement is set by a third party, and for which no good substitutes are available. Examples include pediatric visits, necessary medical procedures, salt, and college textbooks.[263] At least in the short run, a price increase for these results in a relatively low decline in output. On the buy side, the evidence suggests that labor, depending on the profession, is also a low elasticity good, meaning that a reduction in wages does not necessarily produce a significant reduction in supply.[264] On the other hand, the correlation between wages and labor market concentration is strong, indicating that monopsony or oligopsony can be inferred from high concentration levels, just as it is for monopoly or oligopoly in product markets.[265]

Antitrust merger policy should also limit acquisitions that lessen competition in the labor market even though the participants do not compete in any product market. This could take antitrust merger policy into situations whose complexities are largely unresolved. Take as a completely hypothetical example a merger between Google, whose principal products are software, and Intel, whose principal product is processor chips. One might assume that the two firms have none or at least few overlapping products, so a merger between them would be considered nonhorizontal and subjected to lenient antitrust treatment. But on the supply side they may compete intensely for computer engineers or other highly trained employees, and for these the geographic market could be local – far smaller than the worldwide market in which the two firm sells most of their products. In that case the merger should be addressed as horizontal and assessed on the basis of concentration in the labor supply market for the professions in question.

Some labor suppression cartel cases have acknowledged this, reaching agreements between firms that compete for the same employees even though they do not compete to any significant extent in the product market. For example, California v. eBay, Inc., approved the settlement of an antitrust case involving an agreement between eBay and Intuit not to hire one

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[263] For examples, *see* Patrick L. Anderson, et al., *Price Elasticity of Demand* (1997), available at https://scholar.harvard.edu/files/alada/files/price_elasticity_of_demand_handout.pdf. *See also* https://courses.lumenlearning.com/microeconomics/chapter/reading-examples-of-elastic-and-inelastic-demand/ (last visited Jan. 28, 2018).

[264]*See* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 134-145 (12th ed. 2016). *See also* Staiger, *et al*, *supra* note249; Torberg Falch, *The Elasticity of Labor Supply at the Establishment Level*, 28 J. LABOR ECON. 237 (2010); Michael R. Ransom and David P. Sims, *Estimating the Firm's Labor Supply Curve in a "New Monopsony" Framework: Schoolteachers in Missouri*, 28 J. LABOR ECON. 331 (2010).

[265]*See* Azar, *et. al*., *supra* note 246 at 2.

another's computer engineers and scientists.[266] eBay is an online auction broker for new and used goods of all types. Intuit is a producer of business and accounting software whose principal products include Turbotax and Quickbooks. eBay incidentally offers new and used copies of Intuit products on its website when third party vendors place them there, but that relationship between the two firms is vertical and very minor. The firms do not obviously compete in any product market. To the extent that they compete for the same category of employees in the hiring market, however, they are competitors and antitrust merger policy should treat them accordingly. Given that the two firms can profitably collude in this hiring market, a merger of the two should be of competitive concern.

Conclusion

This paper began with an historical question about whatever happened to the antitrust movement. The short answer is that antitrust grew up. It ceased to be the stuff of political banners and loose rhetoric and turned into a serious discipline, applying defensible legal and empirical techniques to problems within its range of competence.

The way to repair deficiencies in antitrust law today is not to resort to an undisciplined set of goals that provide no guidance and could do serious harm to the economy. Rather, it is make ongoing adjustments in our technical rules of antitrust enforcement which reflect what research and experience has taught us.

The antitrust laws can reach nearly every form of anticompetitive behavior, provided that they are interpreted flexibly, but this need not entail throwing out rational evidentiary requirements or accepting expansive theories of harm without proof. Further, antitrust tribunals need to avoid remedies that do more harm than good. Hobbling a large firm is easy; increasing output and benefitting consumers in the process may be much more difficult.

One ongoing problem of antitrust enforcement is assessing effectiveness. Testing antitrust outcomes can be difficult. One advantage of the consumer welfare principle applied to merger law is that it gives us a testable proposition: if the goal of merger policy is to prevent mergers that threaten reduced output and higher prices, then we can evaluate consummated mergers by that standard and see how we are doing. One should not minimize the difficulties. A few mergers might lead to things such as quality improvements that are harder to test for, but in general the success of merger enforcement under the consumer welfare principle is testable and

[266] California v. eBay, Inc., 2014 WL 4273888 (N. D. Cal. Aug. 29, 2014).

has in fact been widely tested. The evidence is troublesome, because it suggests that many mergers that the Agencies approved have led to higher prices.[267] To the extent that is true, merger standards need to be revised and continuously re-examined.

Cartel price fixing[268] and resale price maintenance are two other practices that have been subjected to a fair amount of empirical testing, although in the case of RPM one still may need to adjust for differences in service quality.[269] What all these practices have in common is observable effects that relate the antitrust rule governing the practice to resulting prices.

Unfortunately, other areas of antitrust do not lend themselves so readily to such testing. How would one test whether the existing predatory pricing law is underdeterrent? Or the rule of reason in joint venture cases? There are too few cases and they tend to be idiosyncratic. Devising better testability needs to be an important piece of technical antitrust's agenda. But this fact hardly places technical antitrust at a disadvantage vis-à-vis movement antitrust. The grand generalizations of movement antitrust, with its far flung expectations and unexamined rhetoric, defy testability.

When it performs well, technical antitrust should be able to promote the highest output consistent with unmanaged competition. That in turn will do everything that antitrust is capable of doing for collateral interests such as full employment and more egalitarian wealth distribution.

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[267] *See* KWOKA, *supra* note 173; and Hovenkamp, *Appraising Merger Efficiencies*, *supra* note 173.

[268] See John M. Connor and Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies*, 51 ANTITRUST BULL. 983 (2006) (summarizing studies); John M. Connor, *Price-Fixing Overcharges: Revised 3d Edition* (working paper, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780.

[269] *See* Alexander MacKay and David Aron Smith, *The Empirical Effects of Minimum Resale Price Maintenance* (working paper No. 2-006, Kilts Booth Marketing Series, Oct. 24, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513533 (finding some evidence that consumer prices are higher under rule of reason, and discussing numerous other studies). *See also* Thomas W. Gilligan, *The Competitive Effects of Resale Price Maintenance*, 17 RAND J. ECON. 544 (Winter, 1986) (finding welfare effects of RPM vary depending on the purpose for which it is used); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J. L. & ECON. 263 (1991) (similar).